Supreme Court, U.S.
FILED
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(1) No. 02-1595

In The

Supreme Court of the United States

CHARLES LEE RUTTER,

PETITIONER

v.

STATE OF MISSOURI

On Petition For Writ Of Certiorari
To The Missouri Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the prosecuting attorney is permitted to introduce evidence obtained in violation of Mr. Rutter's Fourth Amendment rights in the State's case-in-chief or in rebuttal as substantive evidence of guilt or whether same may be used only as impeachment evidence.
2. Whether the appropriate standard of review in determining if a constitutional trial error mandates reversal of Mr. Rutter's convictions where it involves the prosecution's presentation of illegally obtained evidence in its case-in-chief is by a reasonable probability that it did not change Mr. Rutter's verdict or whether the appropriate standard is that an appellate court must be convinced beyond a reasonable doubt that it did not change the verdict entered at Mr. Rutter's trial.

PARTIES TO PROCEEDING

The parties to the proceeding are set forth in the caption to this case and are Petitioner, Charles Lee Rutter, with Joseph L. Bauer, Jr., the counsel of record, Terry J. Flanagan, and John W. Peel. The Respondent is the State of Missouri, and is represented by the Missouri Attorney General's Office, Jeremiah W. (Jay) Nixon and Breck K. Burgess.

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1 John W. Strong, *McCormick on Evidence* § 33 (5th Ed. 1999) 5

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State v. Charles Rutter, 2002 WL 713246 (Mo. Ct. App. April 25, 2002)

State v. Charles Rutter, 93 S.W.3d 714 (Mo. 2002)

BASIS OF JURISDICTION

Mr. Rutter seeks review of the Missouri Supreme Court's decision entered on December 24, 2002, which affirmed his convictions for Murder in the First Degree and Armed Criminal Action. Mr. Rutter timely filed a Motion for Rehearing/Reconsideration, and same was denied on or about January 28, 2003. Thus, this Court properly possesses jurisdiction to review this matter pursuant to 28 U.S.C. § 1257 and other like statutes.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the

same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend XIV.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On June 29, 2000, the Petitioner, Mr. Charles Rutter, was found guilty by a jury of Murder in the First Degree and Armed Criminal Action for events occurring on April 4, 1999. Mr. Rutter received a sentence of life imprisonment without the possibility of probation or parole on each count, with these sentences to run concurrently.

On April 4, 1999, Mr. Hinkle was shot one (1) time by Mr. Rutter and subsequently died. The pertinent facts were that Mr. Hinkle destroyed Mr. Rutter's home, physically attacked him and threatened to kill Mr. Rutter. Mr. Hinkle then went to the living room closet in order to locate a long-gun contained therein. Despite Mr. Rutter's requests, Mr. Hinkle continued to reach for the firearm and Mr. Rutter was forced to shoot him in self-defense.

The local law enforcement officers responding to the shooting call entered Mr. Rutter's home. After the securing of the residence, the law enforcement personnel conducted a thorough search of the home, including a search of the living room closet. These same officers testified that there were no firearms contained therein.

Mr. Rutter testified that there were three (3) firearms in that closet on April 4, 1999, and also presented the testimony of Nelson Dean, Gina Warren, Billy Joe Luten, Donald Wright, and Doug Bond where each witness stated that he or she observed these long guns on that date. Thus, the

issue of the contents of this closet was critical to Mr. Rutter's presentation of self-defense.

Based upon the foregoing illegally obtained evidence, which was presented in the State's case-in-chief, the State argued in closing that Mr. Rutter "shot an unarmed man." Moreover, in discussing the search of the closet, the State argued that the officer recalled the "dimensions of that closet were down to 3/8 of an inch ... But he's on his hands and knees in there and he sees no guns."

Following the jury's guilty verdicts, Mr. Rutter timely filed his Motion for New Trial, which, once again, complained of the warrantless search of his home, but this Motion was subsequently denied. A Notice of Appeal was filed to the Southern District of the Missouri Court of Appeals where Mr. Rutter requested review of the trial court's ruling on the Motion to Suppress Evidence. On April 25, 2002, the Court of Appeals affirmed the trial court's ruling, including the Motion to Suppress Evidence issue, and thereby affirmed Mr. Rutter's convictions. A timely Motion for Reconsideration was then filed with the Court of Appeals, but said request was denied on May 16, 2002.

Mr. Rutter filed his Motion for Transfer to the Missouri Supreme Court and same was granted on or about June 25, 2002. The Missouri Supreme Court entered its decision on December 24, 2002, holding that the search of Mr. Rutter's closet was unlawful and in violation of Mr. Rutter's rights bestowed upon

him by the Fourth Amendment, and that Mr. Rutter had preserved this issue for appellate review. That Court, when discussing whether Mr. Rutter was prejudiced by this unlawful search, recognized that "[t]he existence or non-existence of weapons in the closet was integral to Appellant's claim that he acted in self-defense." Ultimately, the Missouri Supreme Court held that the trial court error was harmless because "[t]here is no reasonable probability that the State's presentation of the evidence in its case-in-chief as opposed to rebuttal changed the verdict."

Mr. Rutter filed his Motion for Reconsideration on or about January 7, 2003. In said Motion, Mr. Rutter brought to the Court's attention that the decision improperly allows illegally obtained evidence to be used as substantive evidence of guilt and said decision does not limit the use of this evidence to impeachment evidence only. Mr. Rutter, through his Motion, also complained "[t]hat the Court's opinion fails to find that harmless error was present beyond a reasonable doubt but rather only finds that said error was present in the opinion of the Court by a 'reasonable probability.'"

Mr. Rutter's Motion for Consideration was denied on or about January 28, 2003. This Petition for Writ of Certiorari follows.

ARGUMENT

1. Whether the prosecuting attorney is permitted to introduce evidence obtained in violation of Mr. Rutter's Fourth Amendment rights in the State's case-in-chief or in rebuttal as substantive evidence of guilt or whether same may be used only as impeachment evidence.

The first question presented to this Court is whether evidence of law enforcement officers' observations, which were made and seized in violation of Petitioner's Fourth Amendment rights, may be admitted as substantive evidence of his guilt during the State's case-in-chief and/or in the State's rebuttal.

The Fourth Amendment of the United States Constitution guarantees that individuals shall be free from unreasonable searches and seizures. U.S. Const. amend IV. The Fifth Amendment of the United States Constitution provides that individuals shall enjoy due process of law. U.S. Const. amend V. The Fourteenth Amendment of the United States Constitution also requires that State's provide due process of law and enforce the provisions of the United States Constitution. U.S. Const. amend. XIV. Unfortunately, these same rights were ignored in Mr. Rutter's case.

At Mr. Rutter's trial, the State, in its case-in-chief and through direct examination, presented evidence that at least two (2) separate officers conducted a search of Mr. Rutter's closet, and

through that search they concluded that no weapons were contained therein. State v. Rutter, 93 S.W.3d 714, 721 (Mo. 2002). The Missouri Supreme Court held that "the evidence of the observations of Deputies Helton and Young as to the contents of the closet was seized in violation of the Fourth Amendment, and no exceptions applied, and it was error to allow the State to present the evidence in its case-in-chief." Id. at 728. However, the Missouri Supreme Court also stated the following:

> Regardless of the trial court's error in allowing the disputed evidence to be presented in the State's case-in-chief, the evidence would have been admissible as rebuttal evidence had the trial court not erred. There is no reasonable probability that the State's presentation of the evidence in its case-in-chief as opposed to rebuttal changed the verdict.

Id. at 728-729. In other words, the Missouri Supreme Court believed that no prejudice was suffered by Mr. Rutter in the State's presentation of this evidence in its case-in-chief and that same may be used as

substantive evidence[1] of his guilt in either the State's case-in-chief and/or rebuttal.

In United States v. Havens, 446 U.S. 620, 100 S.Ct. 1912 (1980), this Court discussed the manner in which illegally obtained evidence may be used at a criminal trial. Ultimately, this Court concluded that evidence seized in violation of the Fourth Amendment may be used to impeach a testifying defendant. Id. at 627-628. In so holding, this Court stated that "the ends of the exclusionary rules were thought adequately implemented by denying the

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[1] Impeachment evidence may be defined as evidence "used to attack the truth-telling capacity of a witness." People v. Trujillo, 49 P.3d 316, 319 (Co. 2002) citing 1 John W. Strong, *McCormick on Evidence* § 33 (5th Ed. 1999). While, rebuttal evidence is generally used to contradict an adverse witness or a party's presentation of contradictory evidence or arguments. Trujillo, 49 P.3d 320 (stating that "[t]his type of rebuttal evidence is generally substantive in nature, may support the party's case-in-chief ... and is presented after the opposing party has presented its evidence"). Mr. Rutter further submits that the Missouri Supreme Court clearly understood this distinction in light of their discussion of Mr. Rutter's Motion for New Trial based upon the Mr. Tony Cole's error in testimony.

government the use of the challenged evidence to make out its case in chief." Id. at 627. Moreover, this Court explicitly stated that such illegally obtained evidence may not be used in "the government's direct case, or otherwise, as substantive evidence of guilt." Id. at 628.

In James v. Illinois, 493 U.S. 307, 110 S.Ct. 648 (1990), this Court addressed the issue of illegally obtained statements made by a criminal defendant during trial, and whether same may be used to impeach a witness other than the defendant. In that case this Court stated that said statements may be used "for the limited purpose of impeaching the credibility of the defendant's own testimony." Id. at 312. The Court further stated, relying upon Walder v. United States, 347 U.S. 62, 74 S.Ct. 354 (1954), Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971), Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215 (1975), and United States v. Havens, 446 U.S. 620, 100 S.Ct. 1912 (1980), "[t]his Court insisted throughout this line of cases that 'evidence that has been illegally obtained ... is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt." Id. at 313. This Court reaffirmed its prior holdings of impeachment use only and refused to provide yet another exception to the use of illegally obtained evidence at trial, and thereby disallowed the use of tainted evidence to impeach a witness other than a testifying defendant. Id. at 320.

In each case reviewed by Mr. Rutter involving

the usage of illegally obtained evidence, it appears that this Court engages in a competing interests review balancing the purpose of the exclusionary rule and society's interest in seeking the truth. Originally, this Court in Agnello v. United States, 269 U.S. 20, 35, 46 S.Ct. 4, 7 (1925), held that illegally obtained evidence may not be used whatsoever at a criminal trial. This absolute usage bar was curtailed by this Court's decisions in Walder v. United States, 347 U.S. 62, 74 S.Ct. 354 (1954), which permitted the use of evidence obtained in violation of the Fourth Amendment to impeach the direct testimony of a testifying defendant. The bar to use was once again lessened in Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971), and Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215 (1975), which both permitted the use of illegally obtained statements to impeach a testifying defendant. Then again in United States v. Havens, 446 U.S. 620, 100 S.Ct. 1912 (1980), this Court condoned the use of evidence obtained in violation of the Fourth Amendment to impeach a testifying defendant. However, in James v. Illinois, 493 U.S. 307, 110 S.Ct. 648 (1990), this Court refused to extend the impeachment exception to witnesses other than the defendant. It must be noted that none of the aforementioned cases condoned the use of this evidence as substantive evidence of guilt, and limited the usage to impeachment only.

When discussing these competing interests, the Havens Court, relying upon Walder, Harris, and

Hass, stated that "the ends of the exclusionary rules were thought adequately implemented by denying the government the use of challenged evidence to make out its case in chief." 446 U.S. at 627. In fact, this Court stated in James that allowing the use of this tainted evidence to impeach a testifying defendant furthered the truth seeking process but did not frustrate the purpose of the exclusionary rule and the "balances of values underlying the exclusionary rule justified an exception covering impeachment of defendants' testimony." 493 U.S. 313. Thus, this Court only permits the use of illegally obtained evidence to impeach a testifying defendant because any further usage would frustrate the exclusionary rule. Now the question before this Court in the case at bar is whether use of illegally obtained evidence as substantive evidence of guilt in the State's case-in-chief and/or rebuttal is a proper extension of this Court's prior decisions.

In the case at bar, and in contravention with this Court's competing interest concerns, the Missouri Supreme Court's decision renders the exclusionary rule a figment of imagination, with absolutely no deterrent effect whatsoever. See James, 493 U.S. at 313-314 (refusing to extend use of illegally obtained evidence against witnesses other than a defendant because the "expansion would not promote the truthseeking function to the same extent as did creation of the original exception, and yet it would significantly undermine the deterrent effect of

the general exclusionary rule [in fact] the proposed expansion would frustrate rather than further the purposes underlying the exclusionary rule").

Ultimately, and practically, Mr. Rutter's Fourth, Fifth and Fourteenth Amendment rights were the subject of judicial nullification despite the fact that his life hangs in the balance. Mr. Rutter certainly did not enjoy any Fourth Amendment protections regarding the search of his home and the State suffered no consequence as a result of its constitutionally invalid search. In fact, the officers testified freely during the State's case-in-chief of their search and the tainted fruits therefrom. Mr. Rutter submits that actual application of the Missouri Supreme Court's decision renders his Fourth Amendment rights non-existent and overrules this Court's exclusionary rule as it played no role in his case. See Kuntz v. McCaughtry, 806 F.Supp. 1373, 1380 (E.D. Wis. 1992) citing James, 493 U.S. at 319, 110 S.Ct. at 655 (stating that "[s]o long as we are committed to protecting the people from the disregard of their constitutional rights during the course of criminal investigations, inadmissibility of illegally obtained evidence must remain the rule, not the exception.")

In accord with this Court's prior decisions, Mr. Rutter submits that the illegally obtained observations in question, at best, may be used only as impeachment evidence against Mr. Rutter's own testimony and not as substantive evidence of his

guilt. Mr. Rutter is aware of no case, other than the decision by the Missouri Supreme Court in this matter, that condones or forgives the presentation of illegally obtained evidence in the prosecution's case-in-chief or in rebuttal as substantive evidence of a defendant's guilt. It is Mr. Rutter's contention that the manner in which this illegally obtained evidence was used violated his Fourth, Fifth and Fourteenth Amendment rights bestowed upon by the United States Constitution and that his convictions for Murder in the First Degree and Armed Criminal Action, for which he is now a life-long prisoner of the Missouri Department of Corrections, must be reversed.

In conclusion, Mr. Rutter suggests that Missouri Supreme Court's decision permitting the use of illegally obtained evidence as substantive evidence of guilt in the State's case-in-chief and/or in rebuttal is in error. Therefore, Mr. Rutter prays for an Order of this Court granting his Petition for Writ of Certiorari in order to review the issue presented and so that he may present same fully to this Court.

2. **Whether the appropriate standard of review in determining if a constitutional trial error mandates reversal of Mr. Rutter's convictions where it involves the prosecution's presentation of illegally obtained evidence in its case-in-chief is by a reasonable probability that it did not change Mr. Rutter's verdict or whether the appropriate standard is that an appellate court must be convinced beyond a reasonable doubt that it did not change the verdict entered at Mr. Rutter's trial.**

The next question presented to this Court is what level of belief must an appellate court possess in determining whether a constitutional trial error involving the admission of illegally obtained evidence as substantive evidence of guilt would "change" Mr. Rutter's guilty verdict; reasonable probability or beyond a reasonable doubt.

The Fifth Amendment of the United States Constitution provides that individuals shall enjoy due process of law. U.S. Const. amend V. The Fourteenth Amendment of the United States Constitution also requires that State's provide due process of law and enforce the provisions of the United States Constitution. U.S. Const. amend. XIV.

In the case at bar, the Missouri Supreme Court found that constitutional error was present in that the State was allowed to admit evidence in its case-in-chief that was obtained in violation of the Fourth

Amendment. Rutter, 93 S.W.3d at 728. However, in affirming Mr. Rutter's convictions, the Missouri Supreme Court held that "[t]here is no reasonable probability that the State's presentation of the [tainted] evidence in its case-in-chief as opposed to rebuttal changed the verdict." Rutter, 93 S.W.3d 714, 728-729 (Mo. 2002). In other words, the Court held that it was reasonably probable that Mr. Rutter would be convicted once again if this matter were retried and the evidence were allowed only in rebuttal as substantive evidence of guilt.

This Court in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967), discussed the standard of review regarding constitutional trial court error. In that case, the Court stated that where a criminal defendant suffers a denial of the "rights rooted in the Bill of Rights" the issue becomes that of a federal question, and is then subject to the federal harmless constitutional error standards. Id. at 21. The Court then stated that constitutional error review that an appellate court must employ is "'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction,'" and, if it did contribute, the convictions must be reversed. Id. at 23 citing Fahy v. State of Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230 (1963). In other words, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Id. at 24. One example provided by the Court requiring

this beyond a reasonable doubt standard is where the error involves illegally admitting highly prejudicial evidence or comments. Id.

In Mapp v. Ohio, 367 U.S. 643, 649 81 S.Ct. 1684, 1688 (1961), this Court stated that the exclusionary rule is of constitutional origin. In fact, the Mapp Court stated that illegally obtained evidence cannot be tolerated. Id. citing Byars v. United States, 273 U.S. 28, 47 S.Ct. 248 (1927). Thus, the error involving the enforcement of the exclusionary rule is constitutional error requiring the application of the beyond a reasonable doubt standard, and not one of reasonable probability. See also Chambers v. Maroney, 399 U.S. 42, 52-53, 90 S.Ct. 1975, 1981-1982 (1970) (applying constitutional harmless error beyond a reasonable doubt standard to admission of evidence seized in violation of the Fourth Amendment); Bumper v. North Carolina, 391 U.S. 543, 550, 88 S.Ct. 1788, 1792 (1968) (holding that illegally obtained firearm presented in the prosecution's case-in-chief was not harmless error).

As set forth above, in affirming Mr. Rutter's convictions, the Missouri Supreme Court held that "[t]here is no reasonable probability that the State's presentation of the [tainted] evidence in its case-in-chief as opposed to rebuttal changed the verdict." Rutter, 93 S.W.3d 714, 728-729 (Mo. 2002). In other words, the Court held that it was reasonably probable that Mr. Rutter would be convicted once again if this matter were retried and the evidence

were allowed only in rebuttal as substantive evidence of guilt.

As set forth above in the first question presented, Mr. Rutter believes that the illegally obtained evidence in question may not be used as substantive evidence of his guilt. Nonetheless, the Missouri Supreme Court's belief assumes that Mr. Rutter must testify in his own defense, that there is no other evidence available to establish his theory of self-defense, and that Mr. Rutter would, in fact, present his theory of self-defense during retrial. See State vs. Kinkead, 983 S.W.2d 518, 519 (Mo. 1998) (refusing to discharge defendant after sustaining motion to suppress on appeal because "[t]he State is entitled to rely on the trial court's erroneous ruling in determining what evidence to produce" and therefore the Court did not desire to assume that it was not possible there was some other evidence that would establish the defendant's culpability). Quite frankly, as Mr. Rutter's counsel, I cannot state that the above events will occur within a reasonable degree of probability, let alone beyond a reasonable doubt, in that a criminal defendant must await the presentation of the State's case-in-chief before a true decision is made as to what evidence must be presented.

In accord with Chapman, Mr. Rutter submits that the admission of illegally obtained evidence as substantive evidence in the State's case-in-chief where same involved an integral issue should be

subjected to this beyond a reasonable doubt harmless error review. This is not standard of review employed by the Missouri Supreme Court in reviewing this constitutional error.

The standard of review that the Missouri Supreme Court employed in Mr. Rutter's case is in conflict with the mandate of Chapman in that it is not whether it was reasonably probable that the verdict would change, but rather, whether it was reasonably probable that it contributed to Mr. Rutter's conviction. The Missouri Supreme Court's own finding that the verdict would not change gives rise to the conclusion that it was more than reasonably probable that this evidence contributed to Mr. Rutter's conviction, but rather contributed beyond a reasonable doubt.

Thus, the Missouri Supreme Court's standard of review in determining the severity of this constitutional trial error was improper. Therefore, Mr. Rutter, relying upon this Fifth and Fourteenth Amendment rights, prays that this Court grant his Petition for Writ of Certiorari so that it may review this issue.

CONCLUSION

Wherefore, in light of the foregoing, Mr. Rutter prays for an Order of this Court granting his Petition for Writ of Certiorari so that this matter may be reviewed and determined by this Court.

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PETITIONER'S APPENDIX TO HIS PETITION FOR WRIT OF CERTIORARI

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January 28, 2003

Mr. Terry J. Flanagan
Mr. John W. Peel
Suite 350
133 South 11th Street
St. Louis, MO 63102

In Re: State of Missouri v. Charles Lee Rutter
Missouri Supreme Court No. SC84518

Dear Counsel:

Please be advised that the Court entered the following order on this date in the above-entitled cause:
"Appellant's motion for rehearing overruled."

Very truly yours,

THOMAS F. SIMON

/s/ Cynthia Turley

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC84518
	)	
CHARLES LEE RUTTER,	)	
	)Date of Entry	
Appellant.	)December 24, 2002	

APPEAL FROM THE CIRCUIT COURT OF IRON COUNTY

The Honorable J. Max Price, Judge

Appellant, Charles Lee Rutter, appeals from a judgment of the Circuit Court of Iron County following a jury conviction of murder in the first degree, section 565.020, and armed criminal action, section 571.015.[1]

After opinion by the Court of Appeals, Southern District the case was transferred to this Court.[2] *Mo. Const. art. V, section 10.*

The sufficiency of the evidence supporting Appellant's convictions is not in dispute. This appeal

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[1]All statutory references are to RSMo 2000.

[2]Portions of that opinion are incorporated without further attribution.

concerns seven of the trial court's rulings on: (1) admissibility of evidence seized without a warrant (testimony of two police officers as to what they observed during inspections of a closet at the crime scene); (2) unlimited expert qualification of a defense witness; (3) foundation for expert testimony from State witness' testimony as to bullet patterns; (4) foundation for expert testimony from a State witness' testimony as to the effects of a drug found in the victim's system; (5) erroneous testimony provided by a State witness as to whether Appellant was in possession of illegally obtained prescription medicine; (6) evidence of the victim's past acts of violence; and (7) submission of a voluntary manslaughter instruction to the jury.

All seven points are denied. Appellant is correct that the trial court erred in admitting evidence obtained in the officers' warrantless searches of the closet, but Appellant was not prejudiced by the error. On the other six points raised by Appellant, the trial court did not err.

Facts

The facts and reasonable inferences from such facts are considered favorably to the trial court's ruling and contrary evidence and inferences are disregarded. *State v. Galazin*, 58 S.W.3d 500, 507 (Mo. banc 2001).

In the morning of April 4, 1999, Appellant and Michael Hinkle were alone together in Appellant's house. Some time that morning, Appellant used a

pistol to shoot Michael Hinkle in the back of the head, killing him.

Appellant did not call the police. After authorities were eventually notified several hours later, Deputy Helton of the Iron County sheriffs department was dispatched to "a shooting" at Appellant's residence. He arrived between 1:30 p.m. and 2:00 p.m. There were approximately 20 people outside the residence, many of whom had already been inside. Deputy Helton was met by ambulance personnel who informed him that the only individual inside the house was the victim, who had been fatally shot.

Without consent or a warrant; Deputy Helton entered Appellant's residence to learn if the victim was still alive and the location of the body. He found Hinkle's dead body in the bathtub. Deputy Helton saw evidence of a struggle in the living room - the television and stereo were overturned, the lights and windows were broken. There was a large damp blood stain in the living room carpet near a closet and bloody marks leading into the bathroom. Deputy Helton and the others all departed the house. He observed Appellant outside the residence and ordered him not to leave. Deputy Helton then secured the house by placing sheriffs tape around the back door. He was satisfied that the house was unoccupied and secure.

At approximately 2:00 p.m., Deputy Ivy arrived at the scene. At approximately 2:06 p.m.,

Deputy Young arrived. Without consent or a warrant, Deputies Helton, Ivy and Young reentered Appellant's residence and conducted a search for evidence. They photographed the entire area and took a carpet sample. They photographed and seized a pistol on a chair in the living room and a shell casing at the doorway to the living room closet. The shell casing was visible to those standing in the living room, without the aid of a flashlight. The door to the closet was open, and it was dark inside. Deputy Helton looked around inside the closet with the aid of a flashlight, but did not enter it. He did not see firearms or any other evidence in the closet. At approximately 2:30 p.m., Deputy Young inspected the closet with a flashlight crawling into it on his hands and knees.

Deputy Young believed he was searching for evidence. There was a garment hanging in the left side of the closet. Deputy Young examined the entire closet, but found no weapons or other evidence. He measured the interior of the closet at 4 feet 3 ½ inches by 3 feet 3 3/8 of an inch.

The officers all departed by 5:00 p.m. and released the home to Appellant's family, who boarded up broken windows and removed valuable property.

At 12:01 a.m. the next morning, Deputy Helton obtained a search wan-ant to search Appellant's residence again. He then returned to the residence and collected more evidence, including photographs,

carpet and blood samples.

Appellant was charged with murder in the first degree, a violation of section 565.020, and armed criminal action, a violation of section 571.015. The State waived its right to seek the death penalty.

Appellant filed a pre-trial motion to suppress evidence, arguing that the warrantless searches violated Appellant's Fourth Amendment rights. The motion was overruled following a hearing.

In his opening statement, Appellant's counsel acknowledged that Appellant killed Hinkle. He told the jury that Appellant would testify that, after an argument, Hinkle launched into a violent fury in which Hinkle significantly damaged Appellant's property and physically assaulted Appellant. Then, according to Appellant Hinkle announced that he was going to kill Appellant and started towards the closet, which Appellant alleges contained two rifles and a loaded shotgun. Appellant's counsel told the jury that Appellant would testify that he then shot Hinkle because he believed Hinkle would grab a gun from the closet to kill him. He told the jury to expect the defense to present witnesses who would testify that they observed weapons in the closet after the police released the crime scene.

In its case-in-chief, the State presented testimony of the deputies as to all evidence seized both before and after the issuance of the warrant. This included testimony from Deputies Helton and Young that they did not observe weapons in the

closet and that they inspected it carefully enough to be sure. Appellant's continuing objection to the admissibility of the evidence seized without a warrant was overruled. The State presented the testimony of Dr. Russell Deidiker, a physician who conducted an autopsy of Hinkle. Over Appellant's objections, Dr. Deidiker was allowed to testify as an expert as to a bullet pattern comparison used to determine the distance from which Hinkle was shot and as to the effects of the drug Butalbital that was found in Hinkle's system at autopsy. The State also presented the testimony of Tony Cole, the Iron County coroner, that he retrieved a bottle of prescription medicine from Appellant's home bearing the name of one of Appellant's relatives. From this testimony, the State attempted to make an inference at trial that Appellant had illegally obtained the prescription medicine in his relative's name.

During an in-camera hearing, Appellant presented testimony from Steven Craigmiles, who claimed to be a victim of a past specific act of violence on the part of Hinkle. Appellant testified that because of his knowledge of this incident he had been fearful of Hinkle when he allegedly acted in self-defense. The trial court sustained the State's objection to testimony of the specific act of violence against Craigmiles, but
permitted Appellant to present to the jury evidence of Hinkle's reputation for violence in the community.

In his case-in-chief, Appellant testified as indicated in his opening statement. Appellant presented two rifles and a shotgun as exhibits. Appellant presented the testimony of six witnesses who testified that they were at the crime scene after the shooting and either observed the guns in the closet or observed the guns being removed from the house. Appellant presented Dr. Terry Martinez as a witness, but the trial court sustained the State's objection to qualification of Dr. Martinez as an unlimited expert. Dr. Martinez testified as to the possible effects of Butalbital, a chug found in Hinkle's system at autopsy.

As a rebuttal witness, the State presented testimony from Hinkle's grandmother that Appellant had told her a week to ten days before the shooting that all guns except the pistol used to shoot Hinkle had been removed from Appellant's residence.

The jurors were advised by their instructions that they could find Appellant guilty of murder in the first degree or murder in the second degree. The trial court refused Appellant' 's request to submit a jury instruction on voluntary manslaughter. However, the trial court did instruct the jury on self-defense. The jury returned a verdict that Appellant did not act in self-defense, finding him guilty of first-degree murder and armed criminal action. Appellant was sentenced to concurrent terms of life imprisonment.

Appellant filed a motion for new trial. At the

motion hearing, Appellant presented Cole, who testified that he had erroneously testified at trial as to the name on the seized prescription bottle, when, in fact he had come to believe the Appellant's name was on the bottle. Appellant also repeated his Fourth Amendment arguments concerning the evidence seized without a warrant. The trial court overruled the motion for new trial.

I. Warrantless search and seizure

Appellant has narrowed his original Fourth Amendment argument, conceding that much of the evidence seized without a warrant was in plain view.[3] He now argues that the trial court erred in admitting the testimony of Deputies Helton and Young regarding observations made (and therefore evidence seized) during their warrantless searches of Appellant's closet. Appellant argues that there was no applicable exception to the search warrant requirement.

Appellant, having raised the issue in a pre-trial motion to suppress, stated the objection at trial and repeated the issue in his motion for new trial properly preserved the issue of the admissibility of the evidence obtained during the warrantless

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[3] Additionally, Appellant conceded that he shot Hinkle, so any error as to the admissibility of evidence merely tending to indicate that he shot Hinkle was not prejudicial.

searches of the closet. Therefore, the question on appeal is whether there was error so prejudicial that it deprived Appellant of a fair trial. *Deck,* 68 S.W.3d at 427; *State v. Storey,* 40 S.W.3d 898, 903 (Mo. banc 2001).

The State does not dispute that the police officers' inspections of the closet were conducted in Appellant's home without consent or a warrant.

The Fourth Amendment to the United States Constitution provides that the "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated ..." *U.S. Const. amend IV.*[4] Warrantless searches and seizures inside a home are

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[4] The Missouri Constitution provides: That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation. *Mo. Const. art. I, section* 15. Appellant maintains that the warrantless searches and seizures also violate this protection, but he does not maintain that there is any meaningful difference between this provision and the Fourth Amendment to the United States Constitution.

presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 586 (1980).

A. Exigent circumstances

The State can overcome the presumption that a warrantless search and seizure is unreasonable by showing that it falls within one of a carefully defined set of exceptions, many of which are based on the presence of exigent circumstances.[5] *Id.* at 587; *United States v. Conner*, 127 F.3d 663, 666 (8th Cir. 1997).

Appellant correctly concedes that Deputy Helton's first entrance into Appellant's home was done under exigent circumstances - to verify the status of the victim. However, the inspections of the closet occurred after Deputy Helton secured the crime scene and reentered the home. Appellant argues that any exigency was extinguished by that

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[5] For example, a warrantless intrusion may be justified by hot pursuit of a fleeing felon, imminent destruction of evidence, need to prevent a suspect's escape, or risk of danger to the police or to other persons inside or outside the dwelling. *Minnesota v. Olson, 495 U.S. 91, 100 (1990).* Exigent circumstances should rarely be sanctioned when there is probable cause to believe that only a minor offense has been committed. *Welsh v. Wisconsin, 466 U.S. 740, 753 (1984).* There is no "murder scene exception" to the warrant clause of the Fourth Amendment. *Flippo v. West Virginia, 528 U.S. 11, 14 (1999).*

time. The State argues that the officers' observations of the closet occurred under two exigent circumstance exceptions: the evidence was observed by the officers because it was in plain view when the officers were properly in the home due to exigent circumstances or the evidence was observed as part of a protective sweep of the home. The State also asserts that, even if the evidence was not seized from plain view or during a protective sweep, it was admissible either under the inevitable discovery rule or because Appellant waived his privilege to assert an exclusionary rule.

B. Plain view

The State argues that the evidence seized without a warrant is admissible because the closet was in plain view to Deputy Helton when he was in the home under exigent circumstances.

"The 'plain view' exception to the Fourth Amendment warrant requirement permits a law enforcement officer to seize what clearly is incriminating evidence or contraband when it is discovered in a place where the officer has a right to be." *Washington v. Chrisman* 455 U.S. 1, 5-6 (1982).

> [A] person's reasonable expectation of privacy diminish s as to items that are readily visible in an otherwise private location into which police are invited or a public location

> to which all have access. Under this exception, an officer who is lawfully located in a place from which the object can plainly be seen may seize the object so long as there is probable cause to believe that the object is connected to the crime.

State v. Johnston, 957 S.W.2d 734, 742 (Mo. banc 1997). In *Johnston*, this Court held that a pistol was admissible under the plain view exception because it was "easily seen," "[n]othing had to be moved to see ... or to retrieve it" and it could have been the murder weapon. *Id.* at 743-744. However, a rifle was held inadmissible because it was under the living room sofa and not visible, and bloody jeans found under a bed were held inadmissible because their discovery occurred only after police moved the bed. *Id.* at 744.

To establish the plain view exception, the burden is on the State to prove by a preponderance of the evidence that the evidence obtained in the searches was readily visible, plainly or easily seen.[6]

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[6] The State must also prove by a preponderance of the evidence that there was probable cause to believe that the evidence was connected to the crime, but that is not disputed by Appellant, who admits

Two distinct searches of the closet are at issue in this case. First Deputy Helton inspected the closet. His inspection was of more than what was easily seen from the living room - it was sufficient for him to reach a conclusion about the closet's contents in detail. He inspected it thoroughly enough to be confident that he would have seen any guns. It was light enough in the living room to see a shell casing on the floor in front of the closet. However, it was dark in the closet, and Deputy Helton needed to use a flashlight. These circumstances are insufficient to establish by a preponderance of the evidence that Deputy Helton's observations were readily visible, plainly or easily seen.

Second, Deputy Young inspected the closet. He measured its internal dimensions and crawled into it on his hands and knees with a flashlight. He examined the entire closet. Instead of being evidence that was easily seen, Deputy Young's observations from the inside of the closet were the result of a thorough and laborious search for evidence.
These circumstances are also insufficient to establish by a preponderance of the evidence that Deputy Young's observations were readily visible, plainly or easily seen.

The evidence seized in the course of these two

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telling several people at the crime scene his self-defense theory involving guns in the closet.

searches of the closet was not admissible under the plain view exception.

C. Protective sweep

The State also argues that the evidence was admissible because the officers were permitted to conduct a "protective sweep" - a search of the house for other possible victims or accomplices.

"The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Warden v. Hayden,* 387 U.S. 294, 298-299 (1967).

> [T]he Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises.

Mincey v. Arizona, 437 U.S. 385, 392 (1978).

"[A] 'protective sweep' is justified in connection with an in-home arrest if an officer

reasonably believes that the area to be swept harbors an individual posing a danger to those at the arrest scene." *United States v. Boyd*, 180 F.3d 967, 975 (8th Cir. 1999). The officer's reasonable belief must be based on specific and articulable facts. *Id.* In *Boyd*, the Eighth Circuit found appropriate a protective sweep that included a cursory visual inspection of a closet, because "a person might have been hiding there," and the officers had no way of knowing how many people were in the house. *Id.* at 975-976.

In *Maryland v. Buie, 494 U.S. 325 (1990)*, the United States Supreme Court held:

> As an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that however, ... there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to

> be swept harbors an individual posing a danger to those on the arrest scene. ... [S]uch a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.

Id. at 334-336.

In *Johnston,,* this Court held that the seizure of a shotgun was appropriate under the protective sweep exception because it was in a closet the police had been told that a young child could be in the home, the perpetrator had claimed that unapprehended motorcycle gang members committed the crime and the shotgun could have been the murder weapon. *Johnston,* 957 S.W.2d at

744.

In this case, Deputy Helton had already observed Appellant outside the home. When the two searches of the closet occurred, both deputies believed the house to be secure and unoccupied. The State has the burden to establish that the officers had reasonable beliefs that there was some danger. Here, the deputies acknowledged they had no such fear. They knew that Appellant was outside the house, there was no working theory that would have included any additional victims or perpetrators, and they believed the house to be secure and unoccupied. These circumstances cannot justify the admission of evidence obtained without a warrant under the protective sweep exception.

D. Inevitable discovery

The State argues that even if the testimony in question was not the result of a lawful search, it was still admissible under the inevitable discovery doctrine because the evidence in question would have been discovered through other lawful means in that a search warrant was obtained eventually.

As an exception to the exigent circumstances rule, where law enforcement personnel would ultimately or inevitably have discovered evidence, the evidence is admissible notwithstanding a constitutionally invalid search. *State v. Milliorn*, 794 S.W.2d 181, 184 (Mo. banc 1990). Under this doctrine, illegally seized evidence may be admitted if the State proves by a preponderance of the evidence: (1) that

certain standard, proper and predictable procedures of the local police department would have been utilized, and (2) those procedures inevitably would have led to discovery of the challenged evidence through the State's pursuit of a substantial, alternative line of investigation at the time of the constitutional violation. *Nix v. Williams*, 467 U.S. 431, 444 (1984); *Boyd*, 180 F.3d at 976; *United States v. Glenn*, 152 F.3d 1047, 1049 (8th Cir. 1998); *Conner*, 127 F.3d at 667; *Milliorn*, 794 S.W.2d at 184; *State v. Butler*, 676 SW.2d 809 (Mo. banc 1984). The inevitable discovery analysis cannot involve speculation and must focus on demonstrated historical facts capable of reaay verification or impeachment. *Milliorn*, 794 SW.2d at 186.

In this case, the State presented no evidence of its routine procedures other than what occurred. The officers did not express that there was any impediment to their normal procedures. They secured the crime scene, conducted a thorough search, seized evidence, released the home to the suspect's family and only then began work on obtaining a search warrant. The officers' observations of Appellant's closet were primarily relevant because of the timing of the observations. If the officers had inspected the closet after the warrant was issued, any observations of a lack of weapons in the closet would have been consistent with the testimony offered by Appellant's witnesses. There is no evidence suggesting that if the officers had waited to inspect

the closet until a warrant was issued, they would not have first released the house to Appellant's family to remove valuables such as guns. Consequently, there is no evidence to support a finding that certain standard and predictable procedures would have been employed and inevitably would have led to discovery of the evidence. There is also no evidence that the State was actively pursuing a substantial, alternative line of investigation at the time of the warrantless searches.

Thus, the inevitable discovery doctrine cannot justify admission of the evidence obtained in the warrantless searches of the closet.

E. Waiver

The State argues that even if the evidence was illegally seized as discussed above, it was still admissible because Appellant waived any right to have the evidence excluded by telling the jury in his opening statement that he intended to present testimony on the subject.

When a defendant testifies, he must testify truthfully or suffer the consequences. *United States v. Havens,* 446 U.S. 620, 626 (1980). A criminal defendant does not have the right to commit perjury. *Harris v. New York,* 401 U.S. 222, 225 (1971). Evidence obtained in an illegal search is inadmissible in the State's case-in-chief, but may be admitted as rebuttal evidence to impeach testimony of the defendant. *Havens,* 446 U.S. at 624. This effectuates a delicate balance of competing interests - the deterrent

function of the Fourth Amendment exclusionary rules against the fact-finding goals of a criminal trial. *Id.* at 627. While acknowledging the public policy need for the exclusionary rules, the *Havens* Court expressed concern for both the importance of arriving at truth in criminal trials and a defendants obligation to speak the truth in response to proper questions. *Id.* at 626. When a defendants testimony is inconsistent with constitutionally excluded evidence, he has waived his privilege to continue to assert an exclusionary rule as to the evidence.

In this case, the State seeks to expand the holding of *Havens* beyond a defendant's testimony to include a defendant's opening statement. "The primary purpose of an opening statement is to inform the judge and jury of the general nature of the case, so they may appreciate the significance of the evidence as it is presented." *State v. Thompson,* 68 SW 3d 393, 394 (Mo. banc 2002). "[A] party is not confined in his evidence to the proof of facts recited in the opening statement. " Hays *v. Missouri Pac. R.* Co., 304 S.W.2d 800, 804 (Mo. banc 1957). An opening statement is not evidence.[7] *State v. Madison,* 997 SW.2d 16, 21 (Mo. banc 1999); *State v. Payne,* 95 8 S.W.2d 56 1, 565 (Mo. banc 1997).

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[7] In this case, the trial court properly instructed the jury that "opening statements of attorneys are not evidence."

When evidence is inadmissible because it is not relevant it can nevertheless become admissible because a party has opened the door to it with a theory presented in an opening statement. Therefore, a defendant' s opening statement can open the door to evidence of a prior crime. *Bucklew v. State,* 38 S.W.3d 395, 401 (Mo. banc 2001). A defendants theory presented in an opening statement can render the otherwise irrelevant testimony of the State's medical expert relevant and admissible to contradict the theory. *State v. Skillicorn* 944 S.W.2d 877, 891-892 (Mo. banc 1997).

Unlike the inadmissibility of irrelevant evidence, the exclusion of evidence seized in violation of the Fourth Amendment is a judicially-created rule that furthers a public policy concern. The United States Supreme Court's holding in *Havens* expresses a competing concern that the State have an opportunity to rebut *evidence* presented by a defendant' s possibly untrue testimony. An opening statement is not evidence. Therefore, it presents no such concern. Opening statements do not present a risk that the State will be prevented from rebutting perjured testimony of a defendant.

The *Havens* balance of competing interests allows the admission of the illegally obtained evidence in response to a defendant's testimony, and not earlier. Given that evidence seized inside a home without a wan-ant is presumptively inadmissible, there is no compelling reason to expand the *Havens*

waiver rule to include a defendant's opening statement.

The State notes that Appellant testified as to the contents of the closet, and that Appellant presented witnesses who testified as to the contents of the closet. While a defendant cannot be held responsible for the testimony of other witnesses, his testimony would have triggered the State's right to have the evidence admitted in rebuttal However, that did not occur because the evidence had already been presented. Regardless of what happened later in the trial, the *Havens* waiver rule could not have been applied to the State's case-in-chief, and it was error to admit the evidence at that stage.

Therefore, the evidence of the observations of Deputies Helton and Young as to the contents of the closet was seized in violation of the Fourth Amendment, no exceptions applied, and it was error to allow the State to present the evidence in its casein-chief

F. Prejudice

"Trial court error does not require reversal unless there is a reasonable probability that the trial court's error affected the outcome of the trial." *Johnston,* 957 SW.2d at 744; *State v.* Cook, 628 S.W.2d 657 (Mo. banc 1982). Otherwise, the error is not prejudicial. *Id.*

The existence or non-existence of weapons in the closet was integral to Appellant' s claim that he acted in self-defense. The testimony of the officers

that they did not observe weapons in the closet undercut Appellant's self-defense theory. However, Appellant's theory was also undercut by other evidence that was legally obtained and presented to the jury - the testimony of Hinkle's grandmother.

Appellant's testimony also could have undercut his self-defense theory. "One who unreasonably believes that he must use force to defend himself from an imminent attack or uses an unreasonable amount of force cannot escape conviction on grounds of self-defense." *State v. Redmond,* 937 SW.2d 205, 209 (Mo. banc 1996). Appellant testified that, while Hinkle was turned away from him reaching into the closet, Appellant pulled out a pistol, got up out of his chair, walked over to Hinkle and shot him in the back of the head at close range. Appellant did not claim to have warned Hinkle that he had a pistol or that he would shoot. Nor did he claim to have fired a warning shot or to have first tried any of a variety of less forceful options. A reasonable juror could have believed Appellant's testimony, disbelieved the deputies' testimony that there were no guns in the closet, yet still found that Appellant did not act in self-defense.

Appellant does not dispute that he killed Hinkle, and there was overwhelming evidence that he did so. As Appellant is the only living witness to the events that immediately preceded his shooting of Hinkle, he was compelled to testify in order to present his self-defense theory. He could not present

a plausible self-defense theory without some mention of his belief as to the contents of the closet. Therefore, he could not have presented his self-defense theory without inevitably allowing the State to invoke the *Havens* waiver rule and rebut his testimony with the illegally obtained evidence consisting of the deputies' observations of the closet. Regardless of the trial court's error in allowing the disputed evidence to be presented in the State's case-in-chief, the evidence would have been admissible as rebuttal evidence had the trial court not erred. There is no reasonable probability that the State's presentation of the evidence in its casein-chief as opposed to rebuttal changed the verdict. Therefore, the trial court's Fourth Amendment error was not prejudicial.

II. Testimony of Dr. Martinez

Appellant next argues that the trial court erred in refusing the offer of Dr. Martinez as an expert and in declaring him not an expert in that Appellant argues that a proper foundation was laid for the expert testimony

The qualifications of a witness to render an expert opinion he within the trial court's discretion. *State v. Brown,* 998 S.W.2d 531, 549 (Mo. banc *1999); Mehra v. Mehra,* 819 S.W.2d 351, 355 (Mo. banc 1991). A trial court will, be found to have abused its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock

the sense of justice and indicate a lack of careful consideration. State *v. Brown,* 939 S.W.2d 882, 883 (Mo. banc 1997).

The record indicates that Appellant offered Dr. Martinez as an unlimited expert "for testimony here today." The trial court properly sustained the State's objection to the qualification of Dr. Martinez as an unlimited expert and indicated that it would consider Dr. Martinez's qualifications as to each question posed. The trial court properly ruled that Dr. Martinez could testify on matters within his expertise and that he could not testify on matters outside his expertise. Appellant' s contention that the trial court expressly declared to the jury that Dr. Martinez was not an expert is unsupported by the record.

III. Testimony of Dr. Deidiker as to bullet patterns

At trial, the State presented the testimony of Dr. Deidiker, a physician trained in pathology. Dr. Deidiker testified that he conducted an autopsy upon Hinkle. He also testified about his review of a Missouri State Highway Patrol criminalist's bullet patterning test results and his opinion that Hinkle was shot by Appellant from a distance of four to eight inches.

Appellant argues that the trial court erred in allowing the admission of Dr. Deidiker's testimony of bullet pattern comparison in determining the distance between the weapon and Hinkle at the time

of the shooting. Appellant maintains that this opinion as to distance was based solely upon the criminalist's testing of bullet patterning and that the testing was conducted horizontally, while the evidence presented at trial established that the weapon was fired at an angle.[8] Appellant argues that Dr. Deidiker's testimony as to the distance from which Hinkle was shot was admitted without proper foundation.

As stated above, the qualifications of a witness to render an expert opinion he within the trial court's discretion. *Brown, 998* S.W.2d at *549; Mehra, 819* S.W.2d at 355. A trial court will be found to have abused its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Brown, 939* S.W.2d at *883.*

The trial court did not abuse its discretion in allowing Dr. Deidiker to testify regarding the bullet patterning results. Dr. Deidiker testified that he was a physician trained in anatomical, clinical and forensic pathology and that he had performed

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[8] The State's criminalist performed various tests firing the pistol at numerous targets to show varying patterns of burned and unburned gunpowder that resulted when the pistol was discharged at different distances and angles.

between
600 and 700 autopsies. His testimony regarding the bullet patterning test was based on his previous training and experience, notwithstanding that it was partially based on his review of the criminalist's records.

IV. Testimony of Dr. Deidiker as to Butalbital

Dr. Deidiker also testified that a drug found in Hinkle's body (Butalbital) would have caused sedation and drowsiness rather than excited or violent behavior.

Appellant argues that the trial court erred in allowing the admission of Dr. Deidiker's testimony as to the specific effects of Butalbital. Appellant maintains that Dr. Deidiker was not qualified to reach any such conclusions and, therefore, the evidence was without proper foundation.

There is no reason to dispute the logic of the trial court's discretionary ruling that Dr. Deidiker was qualified to render an opinion regarding the effects of Butalbital on a person. In addition to being a medical doctor, Dr. Deidiker testified that he was familiar with literature regarding Butalbital and its effects on people. Even assuming, arguendo, that this testimony should have been excluded, it was cumulative to that of another of the State's expert witnesses, a forensic toxicologist.

V. Testimony of Tony Cole

Appellant argues that the trial court erred in not granting Appellant's motion for new trial based

upon the post-trial testimony from Cole that he had erroneously testified at trial that Appellant had been in possession of a prescription bottle with a relative's name on it.

> To warrant a new trial based on post-trial newly discovered evidence, the defendant must show: (1) the evidence has come to the knowledge of the defendant since the trial; (2) it was not owing to want of due diligence that it was not discovered sooner; (3) the evidence is so material that it would probably produce a different result on a new trial; and (4) it is not cumulative only or merely impeaching the credibility of the witness. The trial court has substantial discretion in ruling on a motion for a new trial based upon newly discovered evidence, and we will not disturb its decision absent an abuse of discretion.

State v. Whitfield, 939 S.W.2d 361, 367 (Mo. banc 1997) (citations omitted).

Appellant argues that Cole's erroneous testimony at trial was critical to the State's case and played an instrumental role in the jury's arriving at a guilty verdict, because the State argued at trial that Appellant illegally obtained a false prescription.

However, Appellant fails to satisfy the fourth part of the *Whitefield* test - that the evidence is not cumulative only or merely impeaching the credibility of the witness. *Id.* The evidence is cumulative of Appellant's testimony at trial that he did not illegally obtain the prescription. Also, Cole's testimony at the post-trial motion hearing did nothing more than impeach the credibility of his previous testimony, and Appellant had already effectively cross-examined Cole at trial.

Appellant has failed to establish that the trial court abused its discretion in overruling Appellant's motion for new trial.

VI. Evidence of victim's past acts of violence

At trial, during an in-camera hearing, Appellant presented testimony from Craigmiles and himself as to Hinkle's past acts of violence. Craigmiles testified about an incident that occurred a year before Appellant shot Hinkle, in which Hinkle punched Craigmiles in the face three times without provocation. Appellant then testified that Hinkle had told him about the encounter with Craigmiles, bragging that he had "kicked [Craigmiles'] butt."

Appellant testified that he was fearful of Hinkle because of this incident.

The trial court sustained the State's objection to testimony of the specific act of violence against Craigmiles. However, the trial court stated that it would permit evidence of Hinkle's reputation for violence in the community. Later, at trial, Appellant reiterated his offer of proof of Craigmiles' testimony, which was again rejected by the trial court.

Appellant argues that the trial court erred in refusing to allow him to present evidence of specific acts of violence by the victim. He maintains that the evidence was admissible in order to establish and support Appellant' s fear and apprehension of the victim, which was essential to his claim that he acted in self-defense.

A trial court is not required to admit all evidence proffered about a victim's prior specific acts of violence. *State v. Waller,* 816 S.W.2d 212, 216 (Mo. banc 1991). When other competent evidence has raised the question of self-defense, the trial court must exercise caution in discretionary rulings that permit a defendant to introduce evidence of a victim's prior specific acts of violence: (1) for which the defendant has laid a proper foundation; (2) of which the defendant had specific knowledge; (3) that are reasonably related to the crime with which the defendant is charged; (4) that are not too remote in time; (5) that are of quality such as to be capable of contributing to the defendant! s fear of the victim;

and (6) that are not of quality substantially different from the act that the defendant accuses the victim of committing. *Id.*

Appellant testified at the hearing that his only knowledge of Hinkle's alleged assault of Craigmiles came directly from Hinkle, was brief, and provided little detail of the incident. Appellant has not demonstrated that he was sufficiently aware of a specific act of violence against Craigmiles by Hinkle. Nor was the proposed testimony of sufficient quality to reasonably show that Appellant had reason to fear Hinkle would kill him. The wail court did not err in sustaining the State's objection to the proposed evidence.

VII. Voluntary manslaughter instruction

Finally, Appellant argues that the trial court erred in refusing to submit Appellant's requested jury instruction of voluntary manslaughter.

When a jury is given the option to convict a defendant of first degree and second degree murder, and opts to convict on first degree murder, there is no reasonable basis to contend the jury would have found differently had voluntary manslaughter instructions been submitted. State *v. Winfield,* 5 SW.3d 505, 513 (Mo. banc 1999).

The judgment is affirmed.

Richard B. Teitelman, Judge

All concur.

IN THE SUPREME COURT OF MISSOURI
STATE OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC84518
	)	
CHARLES LEE RUTTER,	)	
	)	
Appellant.	)	

APPELLANT'S MOTION FOR RECONSIDERATION AND MEMORANDUM IN SUPPORT

COMES NOW Appellant, Charles Lee Rutter, by and through his attorney, Terry J. Flanagan, P.C., and for his Motion for Reconsideration states the following to this Honorable Court:

1. That this Court issued its decision affirming Mr. Rutter's conviction for Murder in the First Degree and Armed Criminal Action.
2. That said decision, as and for the Motion to Suppress issue presented on appeal, agreed with Mr. Rutter that the search and observations were made unlawfully, but held that the trial court's error in admitting the fruits thereof was not prejudicial and only harmless error.
3. That the Court's decision further denied the

remaining issues presented by Mr. Rutter.

4. That Mr. Rutter submits that the Court's decision overlooks or misinterprets material matters of law or fact and/or fails to consider the far reaching aspects and general importance of its holding including, but not limited to, the following:

   a. The Court's decision improperly allows illegally obtained evidence to be used as substantive evidence, and not merely impeachment evidence, against both a testifying Defendant but also as substantive evidence if any other witness' testimony conflicts with the State's case-in-chief at trial. United States vs. Havens, 446 U.S. 620 (1980); James vs. Illinois, 493 U.S. 307, 313 (1990) (stating that "[t]his Court insisted throughout this line of cases that 'evidence that has been illegally obtained ... is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt'").

   b. That the Court's decision improperly presupposes that there is no other evidence available to Mr. Rutter in order to establish his theory of self-defense, and, in fact, unjustly punishes Mr. Rutter for relying on the trial court's error in presenting sufficient

evidence of self defense as contained within the record and not resorting to other potentially available evidence. See State vs. Kinkead, 983 S.W.2d 518, 519 (holding that because "[t]he State is entitled to rely on the trial court's erroneous ruling in determining what evidence to produce" and thus the Court did not desire to assume that there was not possible other evidence that would establish the defendant's culpability").

c. That the Court's decision improperly allows illegally obtained evidence to be used as impeachment evidence against witnesses other than a defendant, which contravenes the holding of James vs. Illinois, 493 U.S. 307 (1990) (stating that "[t]his Court insisted throughout this line of cases that 'evidence that has been illegally obtained ... is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt'"); See also State vs. Burnett, 637 S.W.2d 680, 690 (Mo. 1982) (holding that "the defendant did not testify and, therefore, cannot be held to have waived his Fourth Amendment rights with respect to the suppressed evidence so as to permit its introduction as

impeachment of his direct testimony. There was no testimony of the defendant to impeach .. [and thus] *Havens* is inapplicable").

d. That the Court's decision may be read that a Defendant must always testify in a criminal proceeding where self defense is at issue despite his uttering exculpatory and/or explanatory statements to others present at the scene of the incident regarding his belief of the need for force.

e. That the Court's decision improperly requires an individual that is the subject of attack within the confines of his own home to fire a warning shot, resort to a variety of less forceful options in the matter of seconds, and/or retreat and avoid the conflict before he may enjoy a viable theory of self-defense. See State vs. Abdul-Khalig, 39 S.W.3d 880, 887 (Mo. Ct. App. 2001) (holding that "[a] person who is attacked in his own dwelling has a right to stand his ground rather than retreat, if this is necessary to save his own life or to protect himself from serious physical harm" in the context of defense of premises which is strikingly similar to self-defense); See also State vs. Allison, 845 S.W.2d 642,

647 (Mo. Ct. App. 1992) (stating that "[a] person who is attacked in his own dwelling has a right to stand his ground rather than retreat, if this is necessary to save his own life or to protect himself from serious physical harm").

f. That the Court's decision improperly places this Court in the role of fact-finder in determining what a reasonable juror may determine in considering an integral and contested factual issue. State vs. Johnson, 54 S.W.3d 598, 605 (Mo. Ct. App. 2001) (stating that "[t]his is not a case where the evidence is such that we can say, without making a credibility determination reserved for the fact finder, that the evidence of guilt of murder was overwhelming and therefore the error was immaterial. There were issues here for the jury's resolution under proper instruction. Accordingly, we are constrained to hold that the failure to instruct on defense of habitation here was prejudicial error"); See also State vs. Garrett, 564 S.W.2d 347, 348-349 (Mo. Ct. App. 1978)

g. That the Court's opinion fails to consider the manner and timing that evidence is presented to the fact-finder, including, but not limited to, witnesses

confronted with impeachment evidence.

h. That the Court's opinion may be construed as holding that the use and presentation of illegally obtained evidence during the State's case-in-chief as substantive evidence is only harmless error and not structural error as defined by State vs. Storey, 986 S.W.2d 462, 464 (Mo. 1992) citing Arizona vs. Fulminante, 499 U.S. 279, 310 (1991). (defining structural error as affecting "'the framework within which the trial proceeds, rather than [being] simply an error in the trial process itself'" including what evidence is presented in an individual's defense in counteracting the State's case-in-chief).

i. That the Court's opinion fails to find that harmless error was present beyond a reasonable doubt but rather only finds that said error was present in the opinion of the Court by a "reasonable probability." See State vs. Miller, 650 S.W.2d 619, 621 (Mo. 1983); Johnson, 54 S.W.3d 598, 605 (Mo. Ct. App. 2001); State vs. Garrett, 564 S.W.2d 347, 348-349 (Mo. Ct. App. 1978) (stating that "[w]e consider the judicial role in determining on appeal whether the improper admission of evidence was

harmless error. For a court to so determine, of necessity it must be able to declare beyond doubt that the tainted evidence did not affect the jury in its fact-finding process. An appellate court has no way of knowing and should not speculate about what evidence a jury did or did not believe and the extent to which that evidence entered into the jury's decision-making process ... 'error in the admission of evidence should not be declared harmless unless it is so without question' ... and that the record must 'demonstrate that the jury disregarded or could not have been influenced by the evidence'").

j. That the Court's opinion fails to properly consider and reconcile the factors in determining whether a constitutional error is prejudicial or harmless. Storey, 986 S.W.2d 462, 466 (Mo. 1999) (stating that "whether constitutional error is harmless, this Court reviews four factors: (1) whether the violations were repeated, (2) whether the trial court made any curative effort, (3) whether exculpatory evidence is transparently frivolous, and (4) whether evidence of guilt is overwhelming"). Mr. Rutter submits

that a careful review of these factors indicates that this constitutional error is something other than harmless.

5. Mr. Rutter, by limiting this Motion for Reconsideration to that of the suppression issue, does not abandon any other argument presented to this Court, but rather merely relies upon his arguments as presented in his Substitute Brief and other filings before this Court.

In support of this Motion, Mr. Rutter presents the following Memorandum in Support:

Background

Mr. Rutter presented several issues for this Court's review including, but not limited to, Mr. Rutter's Motion to Suppress Evidence and the trial court's rulings thereto. On December 24, 2002, this Court issued its decision affirming Mr. Rutter's convictions for Murder in the First Degree and Armed Criminal Action. The primary issue that Mr. Rutter presented to this Court, and desires to address herein, is that of the Motion to Suppress Evidence, specifically certain claimed observations that were presented in the State's case-in-chief. This Court did agree with Mr. Rutter that the search conducted by the officers violated Mr. Rutter's protections against unreasonable searches and seizures afforded to him by the United States Constitution and the Missouri Constitution. However, this Court held that the trial court's error was harmless in that there was no

prejudice suffered by Mr. Rutter. The remaining issues presented by Mr. Rutter were denied in toto.

Argument

In reviewing this Court's opinion, Mr. Rutter believes that several material matters were overlooked by this Court in arriving at its conclusion. Said matters are set forth above and several are addressed in greater detail below. At the outset, it must be stated that this Court held that the error in admitting the claimed observations was harmless because there was "no reasonable probability that the State's presentation of the evidence in its case-in-chief as opposed to rebuttal changed the verdict." This assertion presumes several occurrences that even his counsel cannot state with any degree of certainty including whether that Mr. Rutter would testify, as said decision to testify can only be determined after the presentation of the State's case-in-chief. Moreover, said presumptions appear to conflict with the controlling law in that these claimed observations, on retrial, could only be used, at best, as impeachment evidence and not substantive evidence of guilt; that said claimed observations cannot be used to impeach witnesses other than Mr. Rutter, if he were called to testify; and that there is no other evidence available to Mr. Rutter other than that contained within the record before this Court to establish Mr. Rutter's theory of self-defense. It is Mr. Rutter's suggestion that said presumptions are inaccurate and thus the trial error in this case was, in

fact, prejudicial.

The judicial review that this Court must employ in determining the classification of error is that this Court must be convinced beyond a reasonable doubt that the jury's decision was not affected by the erroneous admission of this illegally obtained evidence before the error may be deemed as harmless. State vs. Johnson, 54 S.W.3d 598, 605 (Mo. Ct. App. 2001) (stating that "[t]his is not a case where the evidence is such that we can say, without making a credibility determination reserved for the fact finder, that the evidence of guilt of murder was overwhelming and therefore the error was immaterial. There were issues here for the jury's resolution under proper instruction. Accordingly, we are constrained to hold that the failure to instruct on defense of habitation here was prejudicial error"); See also State vs. Garrett, 564 S.W.2d 347, 348-349 (Mo. Ct. App. 1978), (stating that "[w]e consider the judicial role in determining on appeal whether the improper admission of evidence was harmless error. For a court to so determine, of necessity it must be able to declare beyond doubt that the tainted evidence did not affect the jury in its fact-finding process. An appellate court has no way of knowing and should not speculate about what evidence a jury did or did not believe and the extent to which that evidence entered into the jury's decision-making process ... 'error in the admission of evidence should not be declared harmless unless it is so without

question' ... and that the record must 'demonstrate that the jury disregarded or could not have been influenced by the evidence'") (internal citations omitted).

a. Substantive Evidence versus Impeachment Evidence

As and for the first matter that Mr. Rutter submits to this Court, it is Mr. Rutter's belief that this Court's opinion stands for the proposition that the results of illegal searches and evidence illegally seized may be introduced in the State's case-in-chief and/or in rebuttal and that said fruits of the illegal activity may be used as substantive evidence. Such a holding would be in direct contravention of current law as set forth in United States vs. Havens, 446 U.S. 620 (1980), James vs. Illinois 493 U.S. 307 (1990), State vs. Burnett, 637 S.W.2d 680 (Mo. 1982), and State vs. Wilkins, 59 S.W.3d 591 (Mo. Ct. App. 2001).

In the case before this Court it cannot be readily contested that the State, in its case-in chief, introduced the testimony of Deputy Helton regarding the results of his search, including the search of the interior of the closet in question, and the introduction of same prior to any cross-examination by Mr. Rutter Thus, it defeats the confines of logic that said introduction was made in rebuttal and/or in order to impeach a testifying witness.

This Court's decision regarding the prejudice issue in the context of substantive evidence versus

impeachment evidence is well summarized by this Court's statement that Mr. Rutter "could not have presented his self-defense theory without inevitably allowing the State to invoke the *Havens* waiver rule and rebut his testimony with the illegally obtained evidence consisting of the deputies' observations of the closet." Mr. Rutter does not contest the fact that the United States Supreme Court allows the use of illegally obtained evidence to be used to impeach a testifying defendant. Havens, 446 U.S. at 628.

However, in the case before this Court, said evidence was not used merely to impeach Mr. Rutter, but rather was used in the State's case-in-chief as substantive evidence that he was guilty of the charges lodged against him. It is this substantive practice that is outlawed by the United States Constitution, the Missouri Constitution and the United States Supreme Court. In fact, in James vs. Illinois, 493U.S. 307, 313 (1990), the United States Supreme Court explicitly stated that "[t]his Court insisted throughout this line of cases that 'evidence that has been illegally obtained ... is **inadmissible** on the government's direct case, or **otherwise**, as **substantive evidence** of guilt." (emphasis added).

In State vs. Burnett, 637 S.W.2d 680, 690 (Mo. 1982), this Court recognized the difference between impeachment evidence and that of substantive circumstantial evidence of guilt. The Burnett Court held that the trial court erred in allowing the admission of suppressed evidence to impeach a

witness who was not the defendant standing trial. Id. The rationale employed is that there is a vast difference between substantive evidence of guilt and impeachment evidence used solely in determining credibility. Id.

In State vs. Johnston, 957 S.W.2d 734, 745 (Mo. 1997), this Court held that the admission of a broken rifle stock was non-prejudicial in that "[a]t most, the rifle was cumulative and its presence added very little to the state's case when one considers the overwhelming, independent evidence of Johnston's guilt and the level of his malevolent brutality." The same cannot be said in the present case, and, in fact, this Court explicitly recognized that "[t]he existence or non-existence of weapons in the closet was integral to Appellant's claim that he acted in self-defense." Thus, this not a situation where the evidence added very little but rather was determinative in the jury's deliberation.

Lastly, and as stated to this Court during oral argument, there is no way in which to determine whether Mr. Rutter would testify in his defense or what evidence he would present if this matter were remanded for retrial and the evidence in question were excluded. It is clear from the case law in Missouri and that of the United States Supreme Court that this illegally obtained evidence is only admissible as impeachment evidence against Mr. Rutter's testimony only and thus, if Mr. Rutter were not to testify said claimed observations would not be

before any jury. See James 493 U.S. at 313, Burnett, 637 S.W.2d at 690. In fact, Mr. Rutter submits to this Court that if the claimed observations were not admitted into evidence, the manner in which his defense would be presented to the jury would be entirely different in nature and source.

Therefore, the next issue that must be addressed is whether Mr. Rutter could present the theory of self-defense without his testimony being presented within the confines of the record before this Court.

2. There was substantial evidence within the record to justify the issuance of a self-defense instruction aside from Mr. Rutter's testimony, and, moreover, the Court's decision presupposes the entirety of the evidence available to him in injecting the issue of self-defense, including that which is outside the confines of this record.

It cannot be readily contested that in order to determine whether a self-defense instruction is required four (4) factors are examined, to-wit:" (1) an absence of provocation or aggression on the part of the shooter; (2) a reasonable belief that deadly force was necessary to protect himself or a third person against an immediate danger of death or serious physical injury; (3) a reasonable cause for that belief; and (4) an attempt by the shooter to do all within his power consistent with his own personal safety to avoid the danger and the need to use deadly force on the victims." Vogel vs. State, 31 S.W.3d 139, 141 (Mo.

Ct. App. 2000). It must be stated that the Court's review in determining the sufficiency of the evidence is viewed in the light most favorable to the defendant. Id.

a. Absence of Provocation or Aggression

The evidence before this Court and the jury included the fact that Mr. Rutter's home was destroyed, with his own personal effects thrown about and broken. The evidence also included the fact Mr. Rutter suffered from a bruised and swollen eye, bruising to his kidneys, but no injury whatsoever to his hands. Additionally, the evidence included the fact that Mr. Rutter suffers from a brain tumor and receives social security disability for same.

b. Reasonable Belief and Reasonable Cause

The evidence included the fact that Mr. Rutter, while at the scene in question, repeatedly uttered the fact that he was forced to do it because Mr. Hinkle was going for a gun. Additionally, there are several witnesses aside from Mr. Rutter that did testify that the closet contained several firearms. The physical evidence also demonstrates that the blood stain is immediately before the closet in question and that a shell casing was found next to said blood stain.

c. Attempt to Avoid Danger

It was uncontested that Mr. Rutter was in his home at the time the incident occurred and therefore any need to retreat is abolished. See State vs. Abdul-Khalig, 39 S.W.3d 880, 887 (Mo. Ct. App. 2001) (

holding that "[a] person who is attacked in his own dwelling has a right to stand his ground rather than retreat, if this is necessary to save his own life or to protect himself from serious physical harm" in the context of defense of premises which is strikingly similar to self-defense); See also State vs. Allison, 845 S.W.2d 642, 647 (Mo. Ct. App. 1992) (stating that "[a] person who is attacked in his own dwelling has a right to stand his ground rather than retreat, if this is necessary to save his own life or to protect himself from serious physical harm").

Additionally, Mr. Rutter submits that if he were not to testify, yet the individuals presented at trial that observed the weapons in the closet were to avail themselves before the trial court, their testimony would not be subject to impeachment with the results of the illegal search. James vs. Illinois, 493 U.S. at 313. Thus, this Court's belief that the results of the illegal search inevitably would have been introduced into evidence is unlikely and incorrect.

Aside from the factors in question, Mr. Rutter does submit that this Court must not limit itself to the facts contained within the record in order to determine whether Mr. Rutter could submit evidence in support of his self-defense theory, and to do so assumes that no additional evidence is available to Defendant. See State vs. Kinkead, 983 S.W.2d 518, 519 (Mo. 1998) (holding that "[o]n this record, it is impossible to say that the prosecution would be unable to make a submissible case had the trial court

ruled correctly. Erroneous admission of evidence does not preclude retrial 'even though when such evidence is discounted there may be evidentiary insufficiency,' and Mr. Rutter submits that what evidentiary leave is granted to the State is also due to Mr. Rutter).

This Court has held, in the criminal context, and on repeated occasions, that it should not assume the evidence available to either the State or a defendant in determining the extent of the evidence available in presenting their respective cases. See Kinkead, 983 S.W.2d at 519. In Kinkead, this Court reversed the Defendant's conviction and ordered the matter remanded to the trial court regarding a motion to suppress evidence. Id. However, the Court did not mandate the discharge of the defendant, but rather remanded the case to the trial court because "[t]he State is entitled to rely on the trial court's erroneous ruling in determining what evidence to produce" and thus the Court did not desire to assume that there was not possible other evidence that would establish the defendant's culpability. Id.

Mr. Rutter submits that this same logic of not assuming the extent of the evidence available to the State must be afforded to a criminal defendant where he possesses the burden of injecting an issue at trial, such as self-defense. State vs. Morrow, 41 S.W.3d 56, 59 (Mo. Ct. App. 2001). In other words, what is good for the goose is also good for the gander.

c. Illegally obtained evidence may not be used to impeach witnesses other than a testifying defendant.

In James vs. Illinois, 493 U.S. 307, 313 (1990), the United States Supreme Court reiterated the holding of United States vs. Havens, 446 U.S. 620 (1980), and stated that "evidence that has been illegally obtained ... is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt." In James, the defendant was charged with murder and attempted murder. Id. at 309. The defendant, following his arrest, made a statement to law enforcement officers that he recently changed his appearance, which altered his appearance to something different from that which was reported as identifying the perpetrator. Id. This statement was suppressed and held excluded from the State's case-in-chief during the trial on the merits. Id. at 309-310.

At trial, the State offered the testimony of several individuals that stated the defendant's appearance on the day of the crime was consistent with the identification made at the crime scene. Id. at 310. The defendant offered the testimony of one witness that testified that the defendant's appearance on the day of the crime was inconsistent with the identification made at the crime scene. Id. The defendant did not testify. Id. The State then used the Defendant's suppressed confession to impeach this one defense witness.

The United States Supreme Court recognized

at the outset that "[t]he impeachment exception to the exclusionary rule permits the prosecution in a criminal proceeding to introduce illegally obtained evidence to impeach the defendant's own testimony. The Illinois Supreme Court extended this exception to permit the prosecution to impeach the testimony of all defense witnesses with illegally obtained evidence. Finding this extension inconsistent with the balance of values underlying our previous applications of the exclusionary rule, we reverse." Id. 308-309. The Court further recognized that the aforementioned exception is limited only to impeach the credibility of the defendant's own testimony, but not as substantive evidence of guilt. Id. at 312. The Court ultimately refused to expand "the class of impeachable witnesses from the defendant alone to all defense witnesses" where said impeachment evidence is based upon illegally obtained evidence. Id. 313.

Thus, in the matter before this Court, the six (6) testifying witnesses that confirmed the existence of the weapons in the closet, and the testimony of any other witness that Mr. Rutter may present as to the existence of these weapons, may not be impeached with the illegally obtained and claimed observations in question. See also State vs. Burnett, 637 S.W.2d 680, 690 (Mo. 1982) (holding that "the defendant did not testify and, therefore, cannot be held to have waived his Fourth Amendment rights with respect to the suppressed evidence so as to

permit its introduction as impeachment of his direct testimony. There was no testimony of the defendant to impeach .. [and thus] *Havens* is inapplicable").

As and for the remaining matters presented above, Mr. Rutter did provide parenthetical citations to the controlling cases and will not belabor the points herein.

WHEREFORE, Appellant prays for an Order and Judgment of this Court setting aside its December 24, 2002, Opinion, entering an Order and Judgment setting aside Mr. Rutter's convictions for Murder in the First Degree and Armed Criminal Action, and Order remanding this matter to the trial court for retrial, and for such other Orders and relief that this Court deems just and proper in the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing Motion for Reconsideration was [ ] mailed via U.S. mail, first class, postage prepaid, [ ] hand-delivered, [ ] transmitted via facsimile this ___ day of _____, 2003 to: Breck K. Burgess, Assistant Attorney General, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT
DIVISION ONE

State of Missouri,	)	
	)	
Respondent,	)	
	)	
v.	)	No. 23851
	)	
Charles Lee Rutter,	)	
	)Date of Entry	
Appellant.	)April 25, 2002	

APPEAL FROM THE CIRCUIT COURT OF IRON COUNTY, MISSOURI
Honorable J. Max Price, Circuit Judge

AFFIRMED.

INTRODUCTION

Charles Lee Rutter ("Defendant") appeals from a judgment of the Circuit Court of Iron County following a jury conviction of murder in the first degree, § 565.020, and armed criminal action, § 571.015.[9] Following his conviction, Defendant was sentenced by the trial court to concurrent terms of life imprisonment without the possibility of probation or parole for murder in the first degree

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[9]Statutory references are to RSMo 1994, unless otherwise noted.

and life imprisonment for armed criminal action, to be served in the Missouri Department of Corrections. Defendant raises six points on appeal, discussed below. We affirm.

FACTS.

Defendant does not challenge the sufficiency of the evidence. Viewed in a light most favorable to the verdict, **State v. Crawford**, 32 SW.3d 201, 204 (Mo.App.2000), the evidence reveals that Defendant was at his residence watching television during the early morning hours of April 4, 1999, when he received a visitor, Michael Hinkle ("Hinkle").[10] Defendant and Hinkle had known each other approximately six years and Hinkle was a frequent visitor at Defendant's residence. According to Defendant, Hinkle asked Defendant if he had any marijuana to smoke and Defendant told Hinkle that he did not. Hinkle then asked Defendant to go with him and get some marijuana. Defendant declined and Hinkle became agitated. At that point, according to Defendant, Hinkle began trashing Defendant's home by destroying lights and windows with a club and slashing Defendant's waterbed. Defendant sat in a chair during much of Hinkle's tirade, although Defendant claims that on at least one occasion Hinkle physically assaulted him by punching him in the eye and kicking him in the kidneys.

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[10]We use the victim's last name only for the purpose of this opinion, we mean no disrespect.

Eventually, Hinkle completed the trashing of Defendant's residence. Then, according to Defendant, Hinkle told Defendant, "I'm going to finish the job and I'm going to kill you," and starting walking towards a closet that Defendant said contained two .22 caliber rifles and a loaded .12 gauge shotgun. Defendant, who was seated in his chair, pulled out a .9 millimeter Ruger pistol, got up, walked over to Hinkle, and shot him in the back of the head from a range of approximately six inches.

Afterwards, Defendant dragged Hinkle from the living room to the bathroom and placed him in the bathtub. Defendant also used numerous rags in an attempt to clean up blood in the living room and bathroom. Defendant placed these rags in a bum barrel behind his house. While Defendant was in his yard, Arvil Harley ("Harley") pulled into the driveway and asked Defendant about Hinkle, to which Defendant replied that "[Hinkle] was gone." However, Defendant did not tell Harley that Hinkle had been shot, nor did he ask Harley to call the police.

Defendant then walked to his mother's house, which was located a quarter-mile away from his residence.[11] [FN3] Defendant went inside and told

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[11]During cross-examination, Defendant admitted that there were two neighbors within closer proximity of his residence than his mother's house.

his step- father, Billy Luten ("Luten"), that he had shot Hinkle. Luten asked Defendant whether he had called the police or an ambulance and Defendant responded that he had not. Luten told Defendant to call them, but Defendant never did. Luten then went to the First Assembly of God Church to tell Defendant's mother what had happened.

At the church, Pastor Donald Dement ("Dement") was asked by Defendant's aunt to go to Defendant's residence because there had been a shooting. Upon arriving at Defendant's house, Dement found the door to be locked and he was unable to gain entry into the house. Eventually, Defendant appeared at the residence and unlocked the door. By that time, several other people had arrived at Defendant's home. When Dement and others entered the house, they found Hinkle dead in the bathtub.

Law enforcement officials were eventually notified and Deputy Chuck Helton ("Dep. Helton") arrived at Defendant's home about two hours after the shooting, between 1:30 and 2:00 p.m. Dep. Helton was the first law enforcement official to arrive at Defendant's home. Dep. Helton entered the home, spoke with Larry Warren, a paramedic, and went to the bathroom and observed Hinkle lying in the bathtub. Dep. Helton then secured the premises by "putting up sheriffs tape and not letting anyone back inside the residence." He then made a search of the

residence. He found a .9 millimeter pistol on a chair in the living room and a shell casing at the doorway of a closet in the vicinity of the living room. About midway through his search Dep. Helton noticed that the door to the closet was open and looked inside the closet with the aid of a flashlight, but did not enter into the closet.[12] Dep. Helton testified that he did not see any firearms in the closet. Shortly thereafter, at approximately 2:06 p.m. Deputy Brian Young ("Dep. Young") entered the crime scene. By this time Dep. Helton, Deputy Don Ivy, and Tony Cole, the Iron County Coroner, were also present. Dep. Young testified that at about 2:30 p.m. he physically entered into the closet on his hands and knees. His way was illuminated through the use of a "MAG light three cell flashlight." He found no weapons in the closet. The officers then seized the shell casing and the pistol. Several hours later, law enforcement officers obtained a search warrant to search Defendant's residence and collected further evidence, including carpet and blood samples.

Defendant was charged by the State with first degree murder and armed criminal action. At Defendant's trial, the above events were related. Defendant testified in his defense and claimed that

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[12]Later, Dep. Young measured the closet and found it to have measurements of 4 feet 3 ½ inches by 3 feet 3/38 inches.

he shot Hinkle in self-defense. Defendant also presented witnesses who testified that they had removed the two rifles and shotgun from the closet after the police searched the house. However, in rebuttal, the State presented testimony from Joan Hinkle, the victim's grandmother, who testified that Defendant had told her a week to ten days before the shooting that all guns except for the .9 millimeter pistol had been removed from his residence.

The jury was advised by their instructions that they could find Defendant guilty of murder in the first degree or murder in the second degree. The trial court refused Defendant's request to submit a jury instruction on voluntary manslaughter. However, the trial court did instruct the jury on self-defense. The jury returned a verdict finding Defendant guilty of first-degree murder and armed criminal action.

DISCUSSION AND DECISION.

I.

In his first point on appeal, Defendant alleges, in pertinent part:

> The trial court erred in allowing the trial testimony of [Dep. Helton] and [Dep. Young] concerning their observations made and the admission at trial of evidence discovered

> during the warrantless search of [Defendant's] home, including the examination of the interior of a closet located in said home and the officers' conclusion that no weapons were present in said closet, where said admission of testimony and evidence was allowed by the trial court over Defendant's objection....

Defendant claims that the officers' search and their observations violated his constitutional rights, and that any exigent circumstances that existed upon their entering the house had terminated by the time of the search.

Defendant concedes in his brief that the original entry of Dep. Helton into Defendant's residence was in response to an emergency call and therefore falls within two exceptions to the search warrant requirement, exigent circumstances and the plain view exception. *See* **State v. Johnson**, 957 SW.2d 734, 742-43 (Mo.banc 1997). However, Defendant claims that the more thorough search of Defendant's house by both Dep. Helton and Dep. Young occurred after the residence was secured. At that point, Defendant maintains exigent circumstances had ceased and a search warrant was

necessary. We disagree.

In two recent cases, this court has discussed what a police officer may lawfully do when entering one's residence in an emergency situation:

> We hold that when a law enforcement officer enters private premises in response to a call for help and thereby comes upon what reasonably appears to be the scene of a crime, and secures the crime scene from persons other than law enforcement officers by appropriate means, all property within the crime scene in plain view which the officer has probable cause to associate with criminal activity is thereby lawfully seized within the meaning of the fourth amendment [of the United States Constitution]. Officers arriving at the crime scene thereafter and while it is still secured can examine and remove property in plain view without a

search warrant.

State v. Tidwell, 888 SW.2d 736, 742 (Mo.App.1994) (quoting **State v. Jolley**, 312 N.C. 296, 321 S.E.2d 883, 886 (1984), *cert. denied*, 470 U.S. 1051, 105 S.Ct. 1751, 84 L.Ed.2d 816 (1985)); **State v. Taylor**, 857 SW.2d 482, 486 (Mo.App. 1993).

Saliently, the Supreme Court of Missouri has also held that "[t]he possibility of another victim or perpetrators in a house are sufficient exigencies to permit the police to undertake a cursory search of those places in the dwelling in which a body may be found or persons may hide." **Johnson**, 957 SW.2d at 744 (approving of seizure of a shotgun found in closet during the course of warrantless search made by police looking for other victims).

Applying these standards to the particular circumstances of the present case, we find that both Dep. Helton and Dep. Young were acting within their authority in responding to a call relating to a homicide. Their respective testimonies at trial, regarding what each did and did not see, were all matters that fell under the exigent circumstances and plain view exceptions recognized by case law.

As best we glean from the record, the searches by Dep. Helton, including the one conducted with Dep. Young, were undertaken within a short span of time after Dep. Helton arrived at the crime scene. These searches were completed rapidly. Given the exigent circumstances existing, each officer was within his right to peruse the crime scene looking

either for additional victims or other perpetrators, together with any other weapons that may have been easily accessible to any perpetrator. *See* **Tidwell**, 888 S.W.2d at 740; **Johnson**, 957 SW.2d at 744 n. 1.

Even assuming that receiving of the testimony of Dep. Young was erroneous, we hold that under the "inevitable discovery" doctrine, the observations of Dep. Young would have been discovered through other lawful means, especially considering that a search warrant was lawfully obtained only hours after the initial search. **Nix v. Williams**, 467 U.S. 431, 445, 104 S.Ct. 2501, 2510, 81 L.Ed.2d 377 (1984): **State v. Jackson**, 756 SW.2d 620, 621 (Mo.App.1988); *see also* **State v. Smith**, 735 S.W.2d 65, 69 (Mo.App. 1987). Point denied.

II.

In his second point, Defendant posits trial court error in refusing to submit Defendant's requested instruction of voluntary manslaughter to the jury for consideration. Defendant claims that the evidence at trial supported an instruction on voluntary manslaughter and failure to instruct the jury "substantially impaired his right to a fair trial."

We need not address Defendant's second point, however. The State has correctly pointed out it is well-established law that when a jury is given the option to convict a defendant of first degree and second degree murder, and opts to convict on first degree murder, then there is no reasonable basis to suggest that a jury would convict on manslaughter

were it given the opportunity. **State v. Winfield**, 5 SW.3d 505, 513 (Mo. banc 1999); **State v. Barnett**, 980 SW.2d 297, 305-06 (Mo. banc 1998); **State v. Smith**, 944 SW.2d 901, 918- 19 (Mo. banc 1997). Defendant has requested this Court to revisit the ruling in **Winfield**, however, we decline to do so. Point denied.

III.

In his third point, Defendant asseverates the trial court erred in "refusing the offer of Dr. Terry Martinez as an expert at trial and in declaring him not an expert in the presence of the jury," because Defendant maintains he laid a proper foundation for his testimony. Defendant claims that the limitations placed on Dr. Martinez's ("Dr. Martinez") testimony and rendering of an expert opinion did not allow the Defendant to adequately present his defense and denied his right to a fair trial.

At trial, Defendant called Dr. Martinez to the stand and asked him several questions regarding his extensive education and background.[13] Defendant then offered Dr. Martinez "as an expert for testimony here today." The State voir dired Dr. Martinez and afterward, objected to the offer of Dr. Martinez as an expert witness. The trial court sustained the State's objection, but commented that it would "take it with each question and proceed

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[13]Dr. Martinez was not a physician.

please." Defendant then questioned Dr. Martinez regarding the effects of a drug, Butalbital, that was found in Hinkle's bloodstream. Dr. Martinez was allowed to elaborate on the general effects of Butalbital based on his observations and experience. *See infra*. However, the trial court did not allow Dr. Martinez to comment on the specific level of Butalbital found in Hinkle. In one exchange the trial court stated the following in open court, "The court is not quarreling with what [Defense attorney] just stated and the way [he has] formed [his] question.... The court is not saying that [Dr. Martinez] is not qualified at all, if [Defense attorney] will rephrase [his] question please."

"The test of an expert's qualification is whether the expert has knowledge from education or experience which will aid the trier of fact." **State v. Scott**, 996 S.W.2d 745, 748 (Mo.App.1999). The matter of qualifying an expert at trial rests primarily in the sound discretion of the trial court. **Id.; *State v. Hoff***, 904 SW.2d 56, 58 (Mo.App.1995). The exercise of the trial court's discretion will be sustained by this Court unless Defendant can demonstrate that there has been an abuse of discretion. **State v. Newcomb,** 934 S.W.2d 608. 611 (Mo.App.1996). A trial court is said to have abused its discretion when its ruling goes against the logic of the circumstances before the trial court and "is so arbitrary and unreasonable as to shock the sense of justice and indicate careful consideration-, if

reasonable persons can differ about the propriety of the actions taken by the trial court, then it cannot be said that the trial court abused its discretion." **State v. Mathews,** 33 SW.3d 658, 660 (Mo.App.2000) (quoting **State v. Brown,** 939 SW.2d 882, 883-84 (Mo.banc 1997)).

In our review of the record, we do not find that Defendant was denied the offer of Dr. Martinez as an expert. While the trial court did limit the testimony of Dr. Martinez, Defendant's contention that the trial court expressly declared to the jury that Dr. Martinez was not an expert is unsupported by the record. As previously set out, during one objection the trial court stated to the jury that it was not commenting on whether Dr. Martinez was "qualified." Furthermore Dr. Martinez was allowed to testify that he had observed individuals who exhibited concentration levels of Butalbital in the "range of 6.3," similar to that level found in the victim during his autopsy. Dr. Martinez was allowed to opine that:

> Such people are at a level where they would appear to be intoxicated or inebriated similar to the intoxication you would see from alcohol.... Such persons would have difficulty with fine motor movement. They would

not be asleep, they would not be comatose certainly, they would be able to move about, they would be able to function. They would have a loss of filtering in their central nervous system so that they [sic] normal constraints would not be there. The process is called disinhibition, Where a person the first thing that runs through their mind comes out their mouth. They may use swear words for example, where they normally would not do that. I've see [sic] them behave in an aggressive manner similar to intoxication where they were upset. I've seen fighting behavior at that level....

Indeed, during closing arguments at trial, Defendant's counsel made the following, pertinent remarks, regarding Dr. Martinez's testimony:

Let's move on to the

Butalbital that was found in his system, in Hinkle's system .... I want you to look, and you have a right to do this, you just look at his credentials. It's been introduced into evidence. The honors that he's won, what he's done in his field, how long he's been in practice and his curriculum vitae.... This man is a renowned expert and he's used to working with this *subject.... Dr.* Martinez worked with particular people on this particular drug. Observed behavior by these people on this drug. He's been involved with over 30,000 types of patients because he is a clinical toxicologist. He has seen the effects, not just on paper. And he's researched, not just one little page of research but he brought the books that he researched. And what

his findings were and
what his conclusions were
is that this causes
aggressive behavior in
this amount, that it's like
an alcohol intoxication.
You've heard him testify
and that's what happened
here. (emphasis added).

Defendant has failed to demonstrate to this Court that he suffered prejudice from the trial court's conduct regarding Dr. Martinez's testimony; nor are we persuaded that the trial court abused its discretion in limiting the expert testimony of Dr. Martinez. **Newcomb**, 934 SW.2d at 611. Point denied.

IV.

Defendant contends in his fourth point on appeal that the trial court erred in refusing to allow Defendant to present evidence of specific acts of violence committed by Hinkle against a third person by the name of Steven Craigmiles ("Craigmiles"). Defendant maintains that such evidence was admissible to show that Defendant reasonably feared Hinkle and was essential to Defendant's theory of self-defense presented at trial.

At trial, during an in-camera hearing, Defendant presented testimony from Craigmiles and himself. Craigmiles testified about an incident that occurred approximately a year before Defendant

shot Hinkle in which Hinkle punched Craigmiles in the face three times without provocation. According to Craigmiles, Defendant was angry because a relative of Craigmiles had made a derogatory remark to Hinkle and Hinkle thought that he, Craigmiles, was responsible for the remark. Defendant then testified that Hinkle had told him about his encounter with Craigmiles, bragging that he had "kicked [Craigmiles's] butt." Defendant testified that because of this incident he was fearful of Hinkle.

The trial court sustained the State's objection to testimony of the specific act of violence against Craigmiles. However, the trial court stated that it would permit evidence of the victim's reputation for violence in the community. Later, at trial, Defendant reiterated its offer of proof of Craigmiles' testimony which was again rejected by the trial court.

In support of his argument, Defendant refers this Court to **State v. Waller,** 816 SW.2d 212 (Mo.banc 1991), which sets out, in part:

> Where justification is an issue in a criminal case, the trial court may permit a defendant to introduce evidence of the victim's prior specific acts of violence of which the defendant had knowledge, provided that the acts sought to be established

are reasonably related to the crime with which the defendant is charged.

To the extent that this Court has changed the rule, it vests new discretion in the trial court. In application of the new rule, courts must exercise caution. The defendant must lay a proper foundation before the evidence can be admitted. Other competent evidence must have raised the question of self- defense. The defendant must show that he was aware of the specific act or acts of violence. The incidents must not be too remote in time and must be of quality such as to be capable of contributing to the defendant's fear of the victim. Where acts are too remote in time or of quality substantially different from the act that the defendant accuses the

> victim of committing, the trial court may decline to admit the proof into evidence.

Id. at 216 (citations omitted).

Defendant argues that the trial court's refusal to allow evidence of the specific act of violence against Craigmiles by Hinkle "substantially impaired [Defendant's] right to a fair trial and due process of law bestowed upon him by the United States and Missouri constitutions." We disagree.

"Under the **Waller** rule, a trial court is not required to admit all evidence proffered about a victim's prior specific acts of violence." **State v. Howard**, 896 SW.2d 471, 485 (Mo.App.1995). "To the contrary, **Waller** says '[t]o the extent that this Court has changed the rule, it vests new discretion in the trial court.' " **Id.** (quoting **Waller**, 816 SW.2d at 216).

Defendant testified at the hearing that his only knowledge of Hinkle's assault of Craigmiles came directly from Hinkle, was brief, and provided little details of the assault. We do not find that Defendant demonstrated that he was sufficiently aware of the specific act of violence against Craigmiles by Hinkle. Nor was it of a sufficient quality to reasonably show that Defendant had reason to fear Hinkle, because the violence was not directed against Defendant. See **State v. Pipes**, 923 S.W.2d 349, 354 (Mo.App.1996); see also **Waller**, 816 SW.2d at 216. The trial court did not err in sustaining the State's objection to the

proposed evidence. Point denied.

V.

In his fifth point on appeal, Defendant alleges trial court error in allowing the State to present testimony from Dr. Russell Deidiker ("Dr. Deidiker"), a physician trained in pathology, regarding a bullet pattern comparison "in determining the distance between [Defendant] and [Hinkle] at the time of the shooting ..." Defendant maintains that Dr. Deidiker's testimony was based upon tests conducted by Mr. Carl Rothove, a criminalist with the Missouri State Highway Patrol crime laboratory, under different conditions to those testified to by Dr. Deidiker.

Defendant further claims the trial court erred in allowing Dr. Deidiker to testify about the specific effects of Butalbital on an individual. He maintains that Dr. Deidiker was not qualified to reach any conclusions concerning the effects of Butalbital. Dr. Deidiker specifically testified, over Defendant's objection, that the effects of Butalbital, a drug found in Hinkle's system, would have caused sedation and drowsiness rather than excited or violent behavior.[14]

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[14] Defendant's fifth point on appeal actually raises two separate points of trialcourt error. "Separate claims of error should be stated in separate points." **State v. Craig,** 33 SW.3d 597, 601 n. I (Mo.App.2000); **Shoemaker v. Ekunno,** 960

At trial, Dr. Deidiker testified that he conducted an autopsy upon Hinkle following the shooting. He then testified about his review of Mr. Rothove's bullet patterning test results and his opinion that Hinkle was shot by Defendant from a distance of four to eight inches.[15]

As previously stated, the matter of qualifying and allowing the testimony of an expert witness at trial rests primarily in the sound discretion of the trial court. **Scott,** 996 SW.2d at 748. The decision of the trial court will not be disturbed by this Court unless we find that there has been an abuse of discretion. **Newcomb,** 934 SW.2d at 611.

We do not find that the trial court abused its discretion in allowing Dr. Deidiker to testify regarding the bullet patterning results. Dr.

SW.2d 527, 531 (Mo.App.1998). Although not in compliance with Rule 84.04(d), we gratuitously review Defendant's point to determine whether there has been a showing of manifest prejudice affecting his substantial rights. *See* **State v. Hornbuckle,** 769 SW.2d 89, 93 (Mo. banc 1989).

[15]Mr. Rothove performed various tests firing the pistol at numerous targets to show varying patterns of burned and unburned gunpowder that resulted when the pistol was discharged at different distances and angles.

Deidiker testified that he was a physician trained in anatomical, clinical, and forensic pathology, and that he had performed between 600 and 700 autopsies. His testimony regarding the bullet-patterning test was based on his previous training and experience, notwithstanding the fact that it was partially based on his review of Mr. Rothove's records. *See* **State v. Kennedy,** 842 SW.2d 937, 940 (Mo.App.1992) (pathologist testifying that gun had been fired 12 to 18 inches from victim's temple); **State v. Danikas,** 11 SW.3d 782, 786 (Mo.App.1999) (forensic pathologist concluded "fatal shot was fired either from over two feet away or into an intermediate object, such as a pillow."); *see also* **State v. Bell**, 62 S.W.3d 84, 92 (Mo.App.2001).

Likewise, Dr. Deidiker appeared qualified to render an opinion regarding the effects of Butalbital on a person. In addition to being a medical doctor, Dr. Deidiker testified that he was familiar with literature regarding Butalbital and its effects on people. Even assuming, arguendo, that this testimony should have been excluded, it was cumulative to that of Dr. Christopher Long, a forensic toxicologist, who testified that Butalbital acts as a sedative.

We do not find that Defendant suffered manifest prejudice affecting his substantial rights by the trial court permitting Dr. Deidiker's testimony regarding bullet patterning comparison or the effects of Butalbital on an individual. See

State v. Maynard, 954 SW.2d 624, 633 (Mo.App. 1997). Point denied.

VI.

Lastly, Defendant asserts in his sixth point on appeal that the trial court erred in failing to grant his motion for new trial based upon new testimony from Mr. Tony Cole, the Iron County Coroner and a witness at the trial, regarding his erroneous testimony at trial relating to a prescription bottle.

At trial, Mr. Cole testified that he retrieved a bottle of prescription medicine from Defendant's home bearing the name of Mr. Kenneth Rutter, a relative of Defendant. From this testimony, the State attempted to make an inference at trial that Defendant had illegally obtained prescription medicine in his relative's name. Later, at a hearing on Defendant's motion for new trial, Mr. Cole testified that he believed he erroneously stated that Mr. Kenneth Rutter's name was on the prescription bottle at trial when, in fact, he now believed that Defendant's name was on the prescription bottle.

A trial court is afforded broad discretion in its determination of whether or not to grant a motion for new trial, and reversal of its decision on appeal is warranted only if it is clear that there has been an abuse of discretion. **State v. Ginn,** 31 SW.3d 454, 457 (Mo.App.2000). The granting of a new trial on the basis of newly discovered evidence is not favored. **State v. Magee,** 911 SW.2d

307, 312 (Mo.App.1995). In this connection, the Supreme Court of Missouri has stated:

> To receive a new trial based on newly discovered evidence the following must be established: (1) the evidence has come to the knowledge of the defendant since the trial; (2) it was not owing to want of due diligence that it was not discovered sooner; (3) the evidence is so material that it would probably produce a different result on a new trial; and (4) it is not cumulative only or merely impeaching the credit of the witness.

State v. Leitner, 945 SW.2d 565, 574 (Mo.App. 1997) (quoting **State v. Amrine,** 741SW.2d 665, 674 (Mo. banc 1987), *cert. denied,* 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988)). Defendant argues that Mr. Cole's erroneous testimony "was critical to the State's case and played an instrumental role in the jury's arriving at a guilty verdict," because the State argued at trial that Defendant illegally obtained a false prescription in the name of his

dead relative. Defendant, however, fails to recognize that Mr. Cole's testimony at the motion for new trial was not newly discovered evidence, but rather it merely impeached the credibility of his previous testimony. "Impeachment evidence is evidence which challenges a witness's credibility." **State v. Gatewood,** 965 S.W.2d 852, 858 (Mo.App.1998). Furthermore, we do not find that this evidence would have produced a different result at a new trial. This is because Defendant effectively cross-examined Mr. Cole at trial and Defendant testified at trial that he did not illegally obtain a prescription using the name of his dead relative.

The evidence Defendant presented at his motion for new trial constituted impeachment evidence and was merely cumulative to testimony presented at trial. *See* ***id.*** at 859. As such, Defendant failed to establish that he was entitled to a new trial and the trial court did not abuse its discretion in denying Defendant's motion for a new trial. ***Id.; Leitner,*** 945 S.W.2d at 574. Point denied.

The judgment is affirmed.

/s/ Robert S. Barney
Robert S. Barney, Chief Judge

SHRUM, P.J. - CONCURS

MONTGOMERY, J. - CONCURS

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Plaintiff/Respondent	)	
	)	
vs.	)	Appellate Cause No. 23851
	)	
CHARLES RUTTER,	)	
	)	
Defendant/Appellant,	)	

APPELLANT'S MOTION FOR REHEARING AND/OR TRANSFER TO THE MISSOURI SUPREME COURT

COMES NOW Defendant/Appellant, Charles Rutter, by and through his attorney of record, Terry J. Flanagan, P.C., and, pursuant to Missouri Supreme Court Rule 30.26, 83.02 and/or 84.17, for his Motion for Rehearing and/or Transfer to Missouri Supreme Court states the following to this Honorable Court:

1. That on or about April 25, 2002, this Court, by J. Barney, J. Shrum and J. Montgomery, rendered its decision in the above-referenced matter affirming Appellant's convictions of Murder in the First Degree and Armed Criminal Action. A copy of this Court's opinion is attached hereto and labeled as

Exhibit A.

2. That, in accord with Missouri Supreme Court Rule 30.26, 83.02 and/or 84.17, Appellant desires rehearing in this matter to call attention to material matters of law or fact overlooked or misinterpreted by the court.

3. That, as and for Issue One (1) that was presented to this Court, which addressed the warrantless search of Mr. Rutter's home after the home was secured by the officers present and these same officers knew that no one was present inside the home in need of assistance and that no perpetrator could be found therein, Mr. Rutter brings to this Court's attention the following:

   a. The Court's opinion failed to consider and/or reconcile the Eastern District holding in State v. Rodgers, 573 S.W.2d 710 ((Mo. Ct. App. 1978), and the Missouri Supreme Court's holding in State v. Johnston, 957 S.W.2d 734 ((Mo. 1997), and, in fact, it appears that the opinion rendered in this matter is in direct conflict with said decisions and creates a conflict between the Eastern District Court of Appeals, the Missouri Supreme Court and the Southern District Court of Appeals. The conflict arises as to the existence and applicability of the exigent

circumstances doctrine and the legality of a subsequent search of an individual's home.

b. The Court's opinion does not make citation to any case that is factually similar to the one before this Court, nor does it distinguish Rodgers, Johnston and Tidwell.

c. The Court's opinion, in applying the inevitable discovery doctrine, failed to consider and/or reconcile the fact that when Appellant's home was released by the officers, the physical characteristics of the home were altered by Appellant's family in boarding up the broken windows and removing valuable items contained therein, including firearms from the closet in question. Thus, in light of the changed circumstances, the inevitable discovery doctrine was inapplicable.

4. As and for Issue Three (3), which involved the limitations placed on Dr. Terry Martinez's expert testimony concerning the specific effects of Butalbital, Mr. Rutter brings to this Court's attention the following:

a. The Court's opinion fails to consider and/or reconcile Cochran vs. Industrial Fuels & Resources, Inc., 995 S.W.2d 489, 495 ((Mo. Ct. App. 1999), where the

Southern District Court of Appeals found that Dr. Terry Martinez was qualified to testify about specific toxicological effects of chemical exposure in a workers' compensation claim.

b. The Court's opinion failed to consider and/or reconcile Section 190.353 of the Missouri Statutes, which requires a board certified toxicologist at a Missouri Poison information center, and several other cases cited by Appellant where Dr. Martinez was allowed to testify as an expert.

c. The Court's opinion provides that "[w]hile the trial court did limit the testimony of Dr. Martinez, Defendant's contention that the trial court expressly declared to the jury that Dr. Martinez was not an expert is unsupported by the record." However, the opinion fails to consider the trial court's statements in response to certain objections made by the State at trial, and in the presence of the jury. For example, the State objected by stating "I'm going to object to that your honor, if he's not been accepted as an expert how can he draw a conclusion" (537:7-9) and the trial court responded that the "Objection is

sustained." (537:10).

5. That as and for Issue Five (5), which involved Dr. Deidiker opining as to the distance between Mr. Hinkle and the weapon at the time the weapon was fired based upon bullet pattern testing conducted by Mr. Rothove, Mr. Rutter brings the following to this Court's attention:

   a. There appears to be a misunderstanding of the facts in that in footnote seven (7) the opinion provides that Mr. Rothove's testing was conducted at various angles. However, Mr. Rothove testified that the testing was not conducted at various angles. (Tr. 369:9-13); (Tr. 371:18-20).

   b. The Court's citation to State v. Kennedy, 842 S.W.2d 937 ((Mo. Ct. App. 1992) and State v. Danikas, 11 S.W.3d 782 ((Mo. Ct. App. 1999) is misplaced in that in those cases this issue was not raised before the Court, and the citation is merely to the factual background contained in the opinion.

   c. The Court's citation to State v. Bell, 62 S.W.3d 84 ((Mo. Ct. App. 2001), is misplaced because the issue before the Court is whether the testimony was appropriate because it was based on inadmissible hearsay.

   d. The Court's opinion failed to consider

and/or reconcile State v. Watt, 884 S.W.2d 413 ((Mo. Ct. App. 1994) and State v. Love, 963 S.W.2d 236 ((Mo. Ct. App. 1997).

6. That as and for Issue Six (6), which involved the denial of Mr. Rutter's Motion for New Trial based upon Mr. Tony's Cole's admitted error in his testimony, Mr. Rutter brings the following to this Court's attention:

   a. The misstatement of fact was argued by the State as indicative of Mr. Rutter's guilt for the crimes charged and submitted to the jury for determination. Thus, the Court's holding that it was argued by the State as an inference of some other illegal act is misplaced.

   b. The Court's holding that this misstatement of fact was merely impeachment evidence fails to consider that the State introduced same in its case-in-chief as substantive evidence and argued same as substantive evidence during its closing arguments.

   c. The Court's opinion fails to consider and/or reconcile Section 491.074 of the Missouri Statutes, which provides that a witness' inconsistent statements shall be deemed as substantive evidence, and not impeachment evidence.

   d. The Court's holding that this

misstatement was merely cumulative is misplaced in that Mr. Cole was the only State witness to testify that Mr. Rutter obtained Butalbital through a prescription in Mr. Rutter's deceased uncle's name.

7. That Mr. Rutter submits his Suggestions in Support of this Motion for Rehearing and/or Transfer for this Court's review.

8. That, in the alternative, transfer to the Missouri Supreme Court is sought because of the general interest or importance of the questions involved in this case, for the purpose of reexamining existing law, and in order to resolve the apparent conflict with this Court's opinion and the holdings of State v. Rodgers, State v. Johnston, and the dicta contained in State v. Tidwell.

WHEREFORE, in light of the foregoing, Mr. Rutter respectfully requests that this matter be submitted for rehearing before this Court en banc or an expanded panel, or, in the alternative, that this cause be transferred to the Missouri Supreme Court for hearing and determination and for such other further Orders and relief that this Court deems just and proper in the circumstances.

Respectfully submitted,
TERRY J. FLANAGAN, P.C.

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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was [ ] mailed first-class, U.S. postage pre-paid, [ ] transmitted via facsimile, [ ] hand-delivered, this 8th day of May, 2002 to: Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102; Fax Number (573) 751-5391.